(1)

Supreme Court, U.S.
FILED

03 356 SEP 2 2003

IN THE

Supreme Court of the United States

STANLEY ADAMS, WARDEN,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Brenda Turner
Brad Beaver
Assistant Attorneys General

Attorneys for Petitioner

RECEIVED
SEP 8 - 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

92 pp

QUESTIONS PRESENTED FOR REVIEW

I. When a federal habeas corpus court must interpret ambiguous statements made by a state trial court in order to decide a habeas petitioner's claim, should the court interpret the statements in the most unconstitutional light possible when an equally plausible constitutional interpretation is available?

II. Where a state appellate court's analysis runs contrary to clearly established Supreme Court law, but it reached the correct result, is a habeas petitioner entitled to relief despite the fact his underlying constitutional rights were not violated?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. When a federal habeas corpus court must interpret ambiguous statements made by a state trial court in order to decide a habeas petitioner's claim, the court may not interpret the statements in the most unconstitutional light possible when an equally plausible constitutional interpretation is available. 6

II. Where a state appellate court's analysis runs contrary to clearly established Supreme Court law, but it reached the correct result, a habeas petitioner is not entitled to relief since his underlying constitutional rights were not violated. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Aleman v. Sternes,
320 F.3d 687 (7th Cir. 2003) 13
Batson v. Kentucky,
476 U.S. 79 (1986) ..... passim
Coleman v. Thompson,
501 U.S. 722 (1991) 6
Delgato v. Lewis,
223 F.3d 976 (9th Cir. 2000) 14
Earley v. Packer,
537 U.S. 3 (2002) 14
Hennon v. Cooper,
109 F.3d 330 (7th Cir. 1997) 14
Hernandez v. New York,
500 352 (1991) 7
Hurtado v. Tucker,
245 F.3d 7 (1st Cir. 2001) 14
Lancaster v. Adams,
24 F.3d 423 (6th Cir. 2003) 1, 6, 11
Miller v. Fenton,
474 U.S. 104 (1985) 9
Parker v. Dugger,
498 U.S. 308 (1991) 10
Patton v. Yount,
467 U.S. 1025 (1984) 9
Purkett v. Elem,
514 U.S. 765 (1995) 7, 10
Ring v. Arizona,
153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) 8
Santellan v. Cockerell,
271 F.3d 190 (5th Cir. 2001) 14

United States v. Rodriguez,
30 F.3d 1318 (10th Cir. 1994) 8
Walton v. Arizona,
497 U.S. 639 (1990) 8
Weeks v. Angelone,
176 F.3d 249 (4th Cir. 1999) 14
Williams v. Taylor,
529 U.S. 362 (2000) 9
Woodford v. Visciotti,
123 S. Ct. 357 (2002) 9

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2241 5
28 U.S.C. § 2254 4
28 U.S.C. § 2254(a) 14
28 U.S.C. § 2254(d) 13, 14

OPINIONS BELOW

The decision of the Michigan Court of Appeals was filed on June 23, 1998, but was not published. *People v. Lancaster*, Michigan Court of Appeals No. 184033. App. 60a. That decision affirmed Petitioner's conviction and rejected Petitioner's *Batson*[1] claim on the grounds that Petitioner had failed to make a *prima facie* showing in the trial court of purposeful discrimination. Petitioner sought leave to appeal this decision in the Michigan Supreme Court. On February 25, 1999, the Michigan Supreme Court denied leave to appeal. *People v. Lancaster*, Michigan Supreme Court No. 112594; 616 N.W.2d 172. Petitioner then filed for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, which on September 25, 2001, granted Petitioner habeas relief on his *Batson* claim. *Lancaster v. Adams*, Eastern District of Michigan No. 00-CV-70691-DT. App. 25a. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On March 26, 2003, the Court of Appeals entered its opinion affirming the district court. *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003). App. 1a. The Court of Appeals denied Respondents petition for rehearing *en banc* by order dated June 4, 2003. App. 67a.

JURISDICTION

The Court of Appeals opinion affirming the district court's grant of habeas relief was entered on March 26, 2003. Respondent's Petition for Rehearing *en banc* was denied on June 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

CONSTITUTIONAL PROVISION

The constitutional and statutory provisions involved in this petition are as follows:

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In broad daylight and before eyewitnesses, Burt Lancaster shot to death his ex-girlfriend. During the jury selection process at Lancaster's murder trial, the initial slate of jurors seated in the jury box consisted of twelve non-African-Americans and two African-Americans. One of the African-Americans was excused for cause. (Tr. I; p. 117) After the prosecutor had exercised several peremptory challenges against non-African-American jurors, a second African-American individual was seated, Mr. Bowden. (Tr. I; p.104) Following additional *voir dire*, including the questioning of Mr. Bowden, the prosecutor attempted to exercise three more peremptory challenges: two on non-African-Americans and one on Mr. Bowden. (Tr. I; p. 115)

Lancaster's trial counsel objected to the challenge to Mr. Bowden as being racially motivated. To Lancaster's benefit, the trial court failed to determine whether defense counsel had made a *prima facie* showing of purposeful discrimination as

required by *Batson v. Kentucky*, 476 U.S. 79 (1986). Instead, the court elicited a response from the prosecutor as to the reason for the challenge. The prosecutor stated that Mr. Bowden's responses were insufficiently pro-prosecution. (Tr. I; pp. 117-118) The prosecutor also stated that he did not feel comfortable keeping Mr. Bowden on the jury panel based on Mr. Bowden's tone and temperament, and based on his "responses, his demeanor, [and] his attitude." (Tr. I; p. 118) Defense counsel rejoined that Mr. Bowden was one of only two African-Americans seated, and that the "practical realities" militated against allowing one of them to be removed. (Tr. I; p. 119) The trial court ruled that the prosecutor had not provided a "valid basis" for the challenge and disallowed it. (Tr. I; p. 120)

As the selection process continued, the prosecutor exercised two more peremptory challenges with respect to non-African-American jurors. One of the replacements for these two strikes was Mr. Webb, a third African-American individual. (Tr. I; p. 128; Tr. II; p. 3) By the end of the selection process, the prosecutor had peremptorily struck an additional four jurors. The prosecutor then renewed his request to peremptorily strike Mr. Bowden, and after a bench conference, the trial court allowed the strike. (Tr. I; p. 137)

The next morning the trial court explained why it reversed itself and allowed the prosecutor to remove Mr. Bowden after the prosecutor's second request:

> [T]he court is not satisfied with the record made with regard to the *Batson* challenge of Mr. Bordon (sic.). We were rushed to pick the jury. Mr. Walton [the prosecutor], at the time wanted to excuse Mr. Bordon (sic.), who was juror number 9, a black gentleman. He was not satisfied with the way in which the answers were given and he believed that he was not favorable to the prosecution. A hearing was

held in chambers. The Court, at that time, was not satisfied with the explanation as given by Mr. Walton.

Subsequent to that, as the process continued, there was another juror, another African-American, who was selected, Mr. Keith Webb, which would have been in seat five. Mr. Walton renewed his objection again to Mr. Bordon (sic). Mr. Sowell vigorously objected to it, saying that if it was right then, it's right now, in terms of the ruling of the Court. The Court reflected – the Court, while not satisfied with the original explanation given Mr. – given by Mr. Walton with regard to Mr. Bordon (sic.), how – the Court, however felt that that explanation was given more credibility by the subsequent examination of the other jurors. The Court then reconsidered its opinion, in light of the examination, and then felt, because of the conduct of the prosecution and the subsequent juror that it was legitimate, but I wanted to put that – Mr. Sowell, on behalf of the defendant, objected. That objection is still noted. [Tr. II; pp. 3-4; App. 69a-70a.]

Lancaster pursued an appeal of right in the state courts, raising among other claims his *Batson* challenge. The Michigan Court of Appeals affirmed in an unpublished opinion. (*People v. Lancaster*, No. 184033 (Mich. Ct. App. June 23, 1998); Opinion; App. 60a.) With respect to the *Batson* claim, the Court found that Lancaster had not established a *prima facie* case in the trial court of purposeful discrimination. Lancaster then filed an application for leave to appeal in the Michigan Supreme Court, but the Court denied leave to appeal by standard order. (*People v. Lancaster*, No. 112594 (Mich. Sup. Ct. February 25, 1999); Order.)

Lancaster then petitioned for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. 28 U.S.C. § 2254. Jurisdiction in the district court

was based on 28 U.S.C. § 2241. The district court granted Lancaster habeas relief on his *Batson* claim. Petitioner appealed, and the United States Court of Appeals for the Sixth Circuit affirmed. In doing so, the Sixth Circuit ignored the fact that the trial court had *reversed* its earlier finding of discriminatory purpose. The Sixth Circuit read the trial court's decision in the most cynical light possible. The Sixth Circuit found:

> The trial court's factual findings made in support of its ultimate ruling that [Lancaster] failed to establish a *Batson* violation with regard to Bowden are, at their core, based on nothing more than the prosecution's decision not to raise a peremptory challenge to a subsequently selected African-American venire member, thereby permitting him to remain on the jury. Indeed, the trial court's explanation for changing its previous finding that [Lancaster] had demonstrated that the prosecutor had impermissibly challenged Bowden on the basis of race was based on the prosecution's subsequent examination of Webb, and the court's conclusion that the prosecutor's conduct during this examination somehow rendered the challenge to Bowden "more credible." These findings are short-sighted and fly in the face of the spirit and purpose of *Batson*.
>
> The very foundation upon which *Batson* rests is the unquestioned premise that while "a defendant has no right to a petit jury composed in whole or in part of persons of his own race[,] . . . the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86 (internal quotations, citations, and footnote omitted). Thus, without more, the prosecutor's decision to select a subsequent African-American juror from the venire does nothing

> to cure the wrong committed under Batson in excluding Bowden because of his race. *Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of Batson.* [*Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003). App. 15a.]

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals in this case conflicts with various decisions of this Court cited below instructing federal habeas courts to forbear from quickly and perfunctorily overturning state convictions. In particular, the Court of Appeals completely abandoned the deference due to state court rulings by reading ambiguous statements made by the trial court in the most unconstitutional light possible when a constitutional interpretation of the same language was equally plausible. This Court's decisions required the Court of Appeals to give the state court the benefit of the doubt.

I. When a federal habeas corpus court must interpret ambiguous statements made by a state trial court in order to decide a habeas petitioner's claim, the court may not interpret the statements in the most unconstitutional light possible when an equally plausible constitutional interpretation is available.

"This is a case about federalism. It concerns the respect that federal courts owe the States. . . ." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). In this case, the Court of Appeals interpreted an ambiguous statement made by a state trial court in ruling on a *Batson* challenge in the most unconstitutional

light possible. It also did so perfunctorily and despite the existence of a perfectly reasonable constitutional interpretation.

Batson prevents a prosecutor from exercising peremptory challenges during the jury selection process in a racially discriminatory manner. When a criminal defendant raises a *Batson* challenge, the trial court should first determine whether a *prima facie* case of purposeful discrimination has been made. *Batson*, 476 U.S. at 96. If this threshold is met, then the prosecutor must come forward with a race-neutral explanation for its strike. *Batson*, 476 U.S. at 97. If the trial court accepts the race-neutral reason as honest, then the strike stands. If the trial court does not believe the prosecutor's explanation, the strike is disallowed. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Once the trial court goes to the second step, whether because a *prima facie* showing has been made or even because the step is glossed over, a reviewing court may not return to the *prima facie* inquiry. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

Contrary to *Hernandez*, the Michigan Court of Appeals rejected Lancaster's *Batson* claim for failure to make a *prima facie* showing of discrimination. This misstep in Lancaster's case prevented the state appellate court from interpreting the trial court's ruling. Accordingly, the federal habeas corpus court was asked to interpret the trial court's ambiguous ruling without the benefit of a state court construction. The question presented by this case is whether in such circumstances it is permissible for a federal habeas court to interpret the state trial court's ambiguous language in the most unconstitutional light possible, when an equally plausible constitutional interpretation is available.

The parties offered the Court of Appeals two conflicting interpretations of the trial court's ultimate ruling allowing the prosecutor to strike Mr. Bowden. Lancaster argued that the trial court's reference to "the subsequent juror" in its ruling

shows that it never really reversed its original finding that the prosecutor struck Mr. Bowden for racially discriminatory reasons, but indicates that the trial court allowed the strike under the mistaken belief that the availability of a replacement African-American juror justified a discriminatory strike. Petitioner argued that the trial court should be taken at its word when it stated that it had "reconsidered" its earlier ruling, and that it reversed its earlier finding of discriminatory intent based on the subsequent conduct of the prosecutor including the fact that he did not attempt to remove any African-American venire persons other than Mr. Bowden. The Court of Appeals perfunctorily accepted Lancaster's interpretation without explaining why it was more plausible than Petitioner's. In doing so, it ignored numerous warnings by this Court.

The general rule is that trial judges are presumed to know the law and to apply it in making their decisions. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds by *Ring v. Arizona*, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002). Therefore, where trial courts make ambiguous or unclear rulings susceptible to both legal and illegal interpretations, reviewing courts will generally presume that the trial court acted properly. See, e.g., *United States v. Rodriguez*, 30 F.3d 1318, 1319 (10th Cir. 1994). The good sense of such a rule is demonstrated by the present case. In light of the trial court's first ruling on Lancaster's *Batson* challenge, it is clear that the trial court was fully aware of the prohibition against racially discriminatory strikes. It strains credulity to assume that the trial court forgot all about this prohibition and allowed a discriminatory strike to stand when it reversed its ruling. It must be assumed that when it reversed its decision, it also reversed its finding of discriminatory intent.

This rule that reviewing courts should not presume error has even more force when it comes to the federal court review of state court rulings in habeas cases. In several different contexts this Court has addressed the deference which federal

habeas courts are required to pay to state court decisions. In *Woodford v. Visciotti*, 123 S. Ct. 357, 360 (2002), this Court stated that 28 U.S.C. sec. 2254(d) imposes a highly deferential standard for evaluating state court rulings on habeas review, and "demands that state court decisions be given the benefit of the doubt." The Court further stated that a "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford*, 123 S. Ct. at 360. In *Miller-El v. Cockrell*, 123 S. Ct. 1029, 154 L. Ed. 2d 931, 952 (2003), this Court recently stated: "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." In *Williams v. Taylor*, 529 U.S. 362, 386 (2000), Justice Stevens wrote that "it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ."

Though these cases primarily dealt with statutorily mandated deference, which as discussed below may not apply in this case, they also reflect a history of judicially mandated respect on the part of the federal courts for the decisions of a co-equal state judiciary. In *Miller v. Fenton*, 474 U.S. 104, 112 (1985), this Court stated that a "federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state judiciary." In *Patton v. Yount*, 467 U.S. 1025, 1038 (1984), this Court found that a "trial court's resolution of [questions of juror bias] is entitled, even on direct appeal, to 'special deference,' e. g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). The respect paid such findings in a habeas proceeding certainly should be no less. See *Marshall v. Lonberger*, 459 U.S. 422, 434-435 (1983)."

Given this tradition of forbearance in habeas cases, the Court of Appeals should not have adopted Lancaster's cynical construction of the trial court's ruling when a constitutional interpretation was available. A perfectly reasonable and constitutional interpretation of the trial court's ruling exists. Quite simply, the trial court never said that its earlier implicit finding of discriminatory intent stood. It stated that it had reconsidered the matter in light of the prosecutor's subsequent conduct and found that the prosecutor's explanation was legitimate. This is a clear statement that the trial court no longer believed that the prosecutor wished to strike Mr. Bowden based on his race. The Court of Appeals should have found that the trial court reversed its earlier finding, if for no other reason than because the trial court said it did. *Parker v. Dugger*, 498 U.S. 308, 315 (1991): "We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."

As the trial court reversed its finding that the prosecutor acted with a racially discriminatory purpose, it essentially found that no *Batson* violation occurred at all. From this finding, Lancaster was required to show on Federal habeas review by clear and convincing evidence that the trial court's ultimate finding of no discriminatory purpose was incorrect. *Purkett v. Elem,* 514 U.S. 765, 769 (1995). The Court of Appeals relieved Lancaster of this weighty burden by refusing to give legal effect to the trial court's decision to reverse its earlier finding.

The fact that the trial court referred to the "subsequent juror" in its ruling does not necessarily mean that it allowed the prosecutor to strike Mr. Bowden based on his race because another African-American was available to replace him. It is equally possible to infer from the record that the fact that the prosecutor did not attempt to strike this subsequent juror but continued to desire to specifically strike Mr. Bowden, indicated that the prosecutor's intent to strike Mr. Bowden was not based

on his race. The Court of Appeals failed to address this interpretation though it was argued by Petitioner. Instead, it took the most cynical view possible, and it did so without discussion.

In the end, the Court of Appeals freed a convicted murderer without inquiring whether a strained interpretation of an ambiguous statement made by the trial court during the jury selection process of his trial should be given credence over the sounder interpretation offered by the State. The failure of the Court of Appeals to take the course of forbearance favored by numerous pronouncements by this Court and adopt the readily available constitutional interpretation of the trial court decision warrants this Court's attention and must be corrected.

II. Where a state appellate court's analysis runs contrary to clearly established Supreme Court law, but it reached the correct result, a habeas petitioner is not entitled to relief since his underlying constitutional rights were not violated.

The Michigan Court of Appeals rejected Lancaster's claim during his appeal of right on the grounds that Lancaster had failed to make a *prima facie* showing of discriminatory intent. Because the trial court had glossed over the *prima facie* step of the *Batson* analysis and reached the issue of actual intent, the Michigan Court of Appeals was forbidden by this Court's precedent from resolving Petitioner's claim on that basis. *Hernandez v. New York*, 500 U.S. 352 (1991). The Sixth Circuit Court of Appeals relied on this error in analysis as providing an independent basis for granting Lancaster habeas relief, 324 F.3d at 434-435 (emphasis added); App. 17a-18a:

> *The decision of the Michigan Court of Appeals to affirm the trial court was an unreasonable application*

of the Supreme Court's decisions in Batson and Hernandez. The failure to identify any precedent from the United States Supreme Court in rendering its decision is not the fatal flaw in that court's decision. See *Early v. Packer*, 537 U.S. 3, 154 L. Ed. 2d 263, 123 S. Ct. 362, 365 (2002) ("Avoiding the[] pitfalls [of being "contrary to" or an "unreasonable application of" Supreme Court precedent] does not require citation of our cases--indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."). Rather, *it is the Michigan Court of Appeals's finding that the Petitioner failed to establish a prima facie case of discrimination that renders the court's decision unreasonable under Supreme Court precedent.* The Supreme Court made clear in *Hernandez* that 'once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court had ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.' 500 U.S. at 359. Accordingly, because the trial court here had ruled on the ultimate question under Batson--whether Petitioner had established intentional discrimination--when it concluded that Petitioner had not demonstrated that the reasons for the strike of Bowden proffered by the prosecution were pretextual, *the Michigan Court of Appeals acted unreasonably under Supreme Court precedent set out in Hernandez when it rested its holding on an issue that had become moot.*

We, therefore, hold that the district court did not err in concluding that the decisions of the Michigan state courts were an unreasonable application of Supreme Court precedent under *Batson* and

> *Hernandez*, and in granting Petitioner's application for writ of habeas corpus.

While it is true that this error in analysis arguably resulted in the state losing the statutory deference it was entitled to under 28 U.S.C. § 2254(d), as discussed above, the state was still entitled to the benefit of the doubt by this Court's tradition of forbearance from quickly inferring error in habeas cases. Moreover, a mere error in analysis by a state appellate court cannot provide an independent basis for granting habeas relief. This common misreading of § 2254(d) was recently debunked by Judge Easterbrook in the case of *Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir. 2003):

> Aleman's premise is that if a state court renders a decision contrary to, or unreasonably applying, federal law, then the prisoner is *entitled* to a writ of habeas corpus. This is not, however, what § 2254(d) says. It begins: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings *unless*" certain things are true. (The emphasis in this quotation is ours.) Unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," collateral relief "shall not be granted." If the state court's opinion was unreasonable--or if the state judiciary did not address the constitutional claim, despite an opportunity to do so--then § 2254(d) no longer applies. A prisoner still must establish an entitlement to the relief he seeks, and it is § 2254(a), not § 2254(d), that sets the standard: the court issues "a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

> Constitution or laws or treaties of the United States." Whether a given prisoner's custody violates the Constitution, laws, or treaties of the United States depends, first, on whether all substantive rules have been respected (the merit of the claim) and, second, on whether any error caused the custody.

Here, the Court of Appeals erroneously used the Michigan Court of Appeals's faulty reasoning as an additional reason for granting Lancaster habeas relief. Under the sound reasoning of Judge Easterbrook, when the Michigan Court of Appeals failed to address the correct constitutional issue in deciding Lancaster's claim, at most it limited § 2254(d) deference.[2] It did not give the Court of Appeals carte blanche to adopt Lancaster's cynical interpretation of the state record without discussion or debate. The Court was still required to determine under 28 U.S.C. § 2254(a) whether Lancaster's constitutional rights had been violated, and that inquiry required it to examine the record more critically.

---

[2] Even though the Michigan Court of Appeals's *analysis* ran contrary to *Hernandez*, it was the state court's *result* that was entitled to deference under § 2254(d). The state appellate court's ultimate adjudication was still entitled to some form of statutory deference. *Earley v. Packer*, 537 U.S. 3 (2002); *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999), *affirmed* 120 S. Ct. 727 (2000); *Hurtado v. Tucker*, 245 F.3d 7 (1st Cir. 2001); *Santellan v. Cockerell*, 271 F.3d 190 (5th Cir. 2001); *Hennon v. Cooper*, 109 F.3d 330, 334-335 (7th Cir. 1997); *Delgato v. Lewis*, 223 F.3d 976 (9th Cir. 2000).

CONCLUSION

The petition for *certiorari* should be granted, and the Sixth Circuit Court of Appeals decision should be reversed and Lancaster's conviction for first-degree murder reinstated.

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Brenda Turner
Brad Beaver
Assistant Attorneys General

Attorneys for Petitioner

Dated: September, 2003

APPENDIX

Table of Contents

Sixth Circuit Court of Appeals Opinion
dated March 26, 2003.....1a-24a

United States District Court Opinion and Order
dated September 25, 2001.....25a-59a

Michigan Court of Appeals Opinion dated
June 23, 1998.....60a-66a

Sixth Circuit Court of Appeals Order Denying
the Petition for Rehearing En Banc dated
June 4, 2003.....67a-68a

Transcript II, dated November 8, 1994, pages 3-4.....69a-70a

BURT LANCASTER, Petitioner-Appellee,

v.

STANLEY ADAMS, Warden, Respondent-Appellant.

No. 01-2498

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

324 F.3d 423; 2003 U.S. App. LEXIS 5774; 2003 FED App. 0090P (6th Cir.)

December 5, 2002, Argued
March 26, 2003, Decided
March 26, 2003, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, *en banc*, denied by *Lancaster v. Adams*, 2003 U.S. App. LEXIS 12560 (6th Cir., June 4, 2003)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 00-70691. Avern Cohn, Senior District Judge. *Lancaster v. Adams*, 2001 U.S. Dist. LEXIS 25143 (E.D. Mich., Sept. 25, 2001)

COUNSEL: ARGUED: Brad H. Beaver, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellant.

Kenneth M. Mogill, MOGILL, POSNER & COHEN, Lake Orion, Michigan, for Appellee.

JUDGES: Before: COLE and CLAY, Circuit Judges; BERTELSMAN, District Judge. *

* The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINIONBY: R. GUY COLE, JR.

OPINION: [*427]

R. GUY COLE, JR., Circuit Judge. Respondent-Appellant Stanley Adams appeals the district court's order conditionally granting a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on behalf of Petitioner-Appellee Burt R. Lancaster. On appeal, Respondent argues that the district court erred in concluding that the decisions of the Michigan state courts were contrary to and unreasonable applications of United States Supreme Court precedent as set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) and *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991). Although Petitioner has not cross-appealed and the district court did not issue a certificate of appealability, in his brief Petitioner argues that the decisions of the Michigan state courts were contrary to or unreasonable applications of *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976) and other cases--an issue that the district court found to have been procedurally defaulted. For the reasons stated below, we AFFIRM the judgment of the district court.

I. Background

Petitioner was charged in Michigan state court with violating Michigan Compiled Laws Annotated § 750.316, first-degree premeditated murder, and Michigan Compiled Laws Annotated § 750.227, possession [*428] of a firearm during the

commission of a felony. The charges arose out of an April 23, 1993 incident in which Petitioner shot and killed his girlfriend, Toni King, in the parking lot of a Southfield, Michigan shopping plaza. At trial, Petitioner did not dispute that he had killed King, but raised insanity and diminished capacity defenses and argued that the murder was not premeditated. A jury convicted Petitioner of both charges. Petitioner was sentenced to serve life in prison without parole for the murder conviction to be followed by a sentence of an additional two years imprisonment for the firearms conviction.

On June 23, 1998, the Michigan Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished per curiam decision. See *People v. Lancaster*, 1998 Mich. App. LEXIS 1781, No. 184033 (Mich. Ct. App. June 23, 1998). On February 25, 1999, the Michigan Supreme Court denied Petitioner's application for leave to appeal the decision of the Michigan Court of Appeals in a brief order. See *People v. Lancaster*, 459 Mich. 951, 616 N.W.2d 172 (Mich. 1999).

On February 8, 2000, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (the "Petition") in the United States District Court for the Eastern District of Michigan. The Petition requested relief upon six grounds, including the two that are the subject of this appeal: (1) whether the decisions of the Michigan state courts finding that Petitioner had not satisfied his burden of proving that the prosecutor purposefully discriminated in exercising his peremptory challenges was contrary to or an unreasonable application of Supreme Court precedent as set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) and its progeny; and (2) whether the Michigan state appellate court's decision that Petitioner was not denied his Fifth Amendment right to remain silent and his Fourteenth Amendment right to due process of law when the prosecutor elicited testimony that he had remained silent during custodial questioning on the advice of counsel was contrary to or an

unreasonable application of Supreme Court precedent as set forth in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976) and other cases.

In a September 25, 2001 decision, the district court conditionally granted the Petition, finding Petitioner's *Batson* claim meritorious. The district court concluded that Petitioner's Doyle claim had been procedurally defaulted and denied his other claims. Respondent now appeals the district court's decision and concomitant judgment granting Petitioner relief pursuant to 28 U.S.C. § 2254 on the *Batson* claim. As mentioned above, though Petitioner seeks to inject the *Doyle* claim into this appeal, he has neither lodged a cross-appeal nor obtained a certificate of appealability from the district court on this issue. The district court stayed the grant of the writ of habeas corpus pending this appeal.

II. Standard of Review

This Court reviews a district court's decision to grant habeas corpus relief *de novo*. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). We review the district court's findings of fact for clear error. *Id.*; *Carson v. Burke*, 178 F.3d 434, 436 (6th Cir. 1999).

Because the Petition was filed after April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), our review of the decisions of the state trial and appellate courts is governed by AEDPA. See *Lindh v. Murphy*, 521 U.S. 320, 323, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) (holding AEDPA applicable to petition filed on or [*429] after AEDPA's effective date); *Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

In AEDPA, Congress provided that:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> . . . resulted in a decision that was contrary to, or an involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), the Supreme Court interpreted the statutory standard for reviewing a petition for writ of habeas corpus. In particular, the Court explained that a state court decision is "contrary to" the Supreme Court's precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the result reached by the Supreme Court]. " *Williams*, 529 U.S. at 405; see *Lewis v. Wilkinson*, 307 F.3d 413, 418 (6th Cir. 2002).

A state court decision may be an "unreasonable application" of clearly established Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407; see *Lewis*, 307 F.3d at 418 (discussing standard).

In reviewing Petitioner's *Batson* claim, which presents a mixed question of law and fact, our review necessarily focuses on the reasonableness of the decisions of the state courts--that is, whether those decisions constituted an unreasonable application of Supreme Court precedent. See *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997) (suggesting that mixed questions of law and fact are reviewed under the "unreasonable application" prong). We are mindful, however, that the question of "whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as *Batson* recognized, a question of historical fact." *Hernandez*, 500 U.S. at 367. Under AEDPA, "primary or historical facts found by state courts are 'presumed correct and are rebuttable only by clear and convincing evidence.'" *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000) (quoting *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999)); see 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 This Court has stated that "[a] district court's ruling on whether the exercise of a peremptory challenge violates equal protection is entitled to 'great deference,' and we may not disturb its judgment unless it is clearly erroneous." *McCurdy v. Montgomery County*, 240 F.3d 512, 521 (6th Cir. 2001) (citing *United States v. Buchanan*, 213 F.3d 302, 308-09 (6th Cir. 2000)); see *United States v. Bartholomew*, 310 F.3d 912, 919 (6th Cir. 2001); *United States v. Copeland*, F.3d, 321 F.3d 582, 2003 U.S. App. LEXIS 3365, 2003 WL 431897 (6th Cir. Feb. 25, 2003). While this standard is appropriate for direct appellate review, see *Hernandez*, 500 U.S. at 369, the standard must be modified in the context of a § 2254 petition to give credence to § 2254(e)(1)'s requirement that facts found by a state court be presumed correct unless the petitioner rebuts this presumption by clear and convincing evidence. See 28 U.S.C.

§ 2254(e)(1); cf. *Purkett v. Elem*, 514 U.S. 765, 769, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995) (discussing pre-AEDPA standard under § 2254(d)(8)).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*430] III. *Batson v. Kentucky* Claim

A. Relevant Facts

On November 7, 1994, the Michigan trial court conducted jury selection for Petitioner's trial. After one African-American, Michael Hurd, was selected and another African-American, Alvin Mitchell, was excused for cause, the following colloquy took place between the trial court and another potential juror, Jackie Bowden, who is also African-American.

The Court: Thank you. With regard to Mr. Bowden. How are you today, sir?

Juror Bowden: All right.

The Court: Where do you work, sir?

Juror Bowden: I drive a semi-truck for a flea market.

The Court: For?

Juror Bowden: A western flea market.

The Court: Okay. And where does your wife work?

Juror Bowden: (inaudible)

The Court: She worked as a secretary?

Juror Bowden: (inaudible)

The Court: Where did--where?

Juror Bowden: She was a receptionist at--

The Court: Okay. What kind of outfit was it?

Juror Bowden: It was like a motel.

The Court: Okay. Now, are you familiar with the scene of the alleged crime?

Juror Bowden: Um, yes.

The Court: Okay. Do you know any of the individuals here?

Juror Bowden: Um, no.

The Court: Can you be fair. [sic]

Juror Bowden: Yea, I can be fair.

The Court: Would you want you as a juror?

Juror Bowden: Um, I think so.

The Court: That's an underwhelming response. We'll delve into that. Can you be fair?

Juror Bowden: Yea.

The Court: Are you honest?

Juror Bowden: Yes, I'm honest.

The Court: Can you listen to both sides?

Juror Bowden: (no verbal response)

The Court: If worse comes--if the prosecution proves their case beyond a reasonable doubt, based upon the law I give you, can you find the defendant guilty?

Juror Bowden: (no verbal response)

The Court: To the best of your ability can you assure me that you can find him guilty?

Juror Bowden: Yes.

The Court: If, however, the prosecution does not meet it's [sic] burden, can you find the defendant not guilty?

Juror Bowden: Yes.

The Court: Can you sit in judgment of a fellow human being?

Juror Bowden: Yes.

The Court: Can you swear to me, swear to the defendant, and swear to the prosecution that you can be fair?

Juror Bowden: Yes.

The Court: Can you swear and assure to us that you'll listen to the testimony and make your decision only on the facts and evidence and the law that I give to you?

[*431] Juror Bowden: I swear.

The Court: Can you commit to us that your decision will be based only on the facts and not because you like somebody or you don't like somebody?

Juror Bowden: Yes.

The Court: That's what it's all about. Any questions?

At the conclusion of this colloquy, neither the prosecutor nor defense counsel had any questions for Bowden.

Shortly after this colloquy, the prosecutor simultaneously exercised three peremptory challenges, striking the juror in seat two, Roanne Hassinger, the juror in seat twelve, Mr. Bednaris, and Bowden, who was in seat nine. Hassinger and Bednaris are not African-American. The trial court immediately excused Hassinger and Bednaris, but told Bowden to remain in his seat and called for a bench conference. After a two-minute bench conference, the transcript of which is not in the record before this Court, the trial court took a ten-minute recess.

When court returned to session, the trial court announced that a *Batson* challenge had been made in connection with the prosecutor's challenge to Bowden, which was based on the prosecution's contention that Bowden's responses were not "strong enough" to satisfy the prosecution.

At the request of the trial court, the prosecution then argued that it had a basis independent of race for striking Bowden. The prosecution first pointed out that three African-American men had already been called to sit on the jury: Mitchell, whom the trial court excused for cause; Hurd, who was still on the jury; and Bowden. Second, the prosecutor stated that both he and an investigator sitting with him at counsel table, Detective Phillips, who the prosecutor made clear is African-American, agreed that Bowden was not favorable to the prosecution. They had reached this conclusion, the prosecutor explained, based on Bowden's responses, demeanor, attitude, tone, and temperament. Finally, the prosecution argued that the fact that "there were . . . three minorities called in this case and two of them remain on the jury does not demonstrate that there is a prima facie showing of exclusion on the basis of race."

In response to the prosecution's arguments, the trial court voiced concern about the exclusion of Bowden: "I understand that, but once he is excluded there will be only one African-American on that panel . . . I understand that. I understand--it's the reality of it though . . . ." Counsel for Petitioner then echoed this sentiment, agreeing that, as a practical matter, the exclusion of Bowden may result in no African-Americans serving on the jury. Petitioner's counsel then argued that Bowden's responses indicated that he could be fair and, therefore, that there existed no reasonable basis for striking Bowden. After this argument, the trial court rejected the prosecution's proffered reasons for the strike as pretextual and ruled that the prosecution had purposefully discriminated on the basis of race by attempting to strike Bowden.

The trial court resumed juror *voir dire*. Approximately thirty minutes later, after the trial court had seated another African-American, Keith Webb, and three other jurors, who were not African-Americans, the prosecution requested a bench conference. After the minute-long bench conference, the transcript of which is not in the record, the trial court announced: "Mr. Bowden, I'm going to ask that you go down to the jury office. Thank you very much. Okay. Next please?"

The following morning, the trial court attempted to describe the ruling it had made on the previous day. In particular, [*432] the trial court explained that, after the prosecution's initial attempt to strike Bowden, the trial court had not been satisfied by the prosecution's explanation that the strike was based on Bowden's responses during *voir dire* and the prosecution's belief that Bowden was not favorable to the prosecution. However, as *voir dire* continued, the trial court believed the government's subsequent conduct lent credibility to its earlier explanation of its attempt to strike Bowden. In particular, the trial court focused on the fact that, subsequent to its initial decision, another African-American, Webb, had been

seated without objection by the prosecution. Thus, the trial court explained, it had reconsidered its opinion based on this subsequent *voir dire* and concluded that the prosecution's strike of Bowden had, in fact, been legitimate.

On appeal, the Michigan Court of Appeals found, without mention of any Supreme Court decision, that Petitioner had not made a *prima facie* showing of purposeful discrimination and, therefore, that there was no error in the trial court's ruling that the prosecutor's use of a peremptory challenge against Bowden had been constitutional. See *People v. Lancaster*, 1998 Mich. App. LEXIS 1781, *6, No. 184033 (Mich. Ct. App. June 23, 1998).

B. Legal Standard

It is clearly established that a prosecutor may not exercise his peremptory challenges to exclude a potential juror on the basis of race. In *Batson v. Kentucky*, 476 U.S. 79, 96, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), the Supreme Court articulated a three-step analysis to be applied to an Equal Protection Clause claim that purposeful discrimination occurred in the selection of the petit jury based solely on the prosecutor's exercise of his peremptory challenges at trial. See *Bartholomew*, 310 F.3d at 919. First, the defendant must establish a *prima facie* case of racial discrimination. See *Copeland*, 2003 U.S. App. LEXIS 3365, 2003 WL 431897 at *10. This requires an initial showing that "the defendant . . . is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96 (citation omitted). "The defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 97 L. Ed. 1244, 73 S. Ct. 891 (1953)). Ultimately, the defendant, relying on this presumption and

other facts, must "raise an inference that the prosecutor used [the practice of peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Id.*

Second, once the defendant has raised the necessary inference, "the burden shifts to the state to come forward with a neutral explanation for challenging [potential] jurors." *Id.* at 97. "The government is not required to persuade the court that its reasons for dismissing the juror were well-founded; rather it need only demonstrate that its reasons were race-neutral." *Copeland*, 2003 U.S. App. LEXIS 3365, 2003 WL 431897 at *10. More specifically, the second step of this process does not demand an explanation that is persuasive or even plausible. 'At this . . . step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'

Purkett, 514 U.S. at 767-68 [*433] (quoting *Hernandez*, 500 U.S. at 360).

Third, the party opposing the strike must demonstrate that the prosecutor's purported explanation is merely a pretext for racial motivation. See *McCurdy*, 240 F.3d at 521 (describing *Batson* test). Ultimately, the court must determine "whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359. In making this determination, the court presumes that the facially valid reasons proffered by the prosecution are true. *Id.* at 359-60. Racially discriminatory purpose or intent must be affirmatively shown by the opponent of the strike. *Id.* at 360. The ultimate burden of persuasion always remains with the opponent of the strike. See *United States v. McFerron*, 163 F.3d 952, 955 (6th Cir. 1998).

C. Analysis

Respondent argues that the district court erred in finding that the decisions of the Michigan trial and appellate courts were contrary to and unreasonable applications of clearly established Supreme Court precedent. The Michigan trial court initially found that the prosecutor's challenge to juror Bowden was improperly based upon purposeful discrimination, but then, upon reconsideration, the trial court found the challenge constitutional. The Michigan appellate court affirmed this finding on another ground--that Petitioner had failed to establish a prima facie case of discrimination. The focus of our review, as explained above, is on whether the decisions of these state courts were unreasonable applications of Supreme Court precedent as set out in *Batson* and its progeny, including, in particular, *Hernandez*, which held that the question of whether a *prima facie* case has been established becomes moot once a court rules on the ultimate question under *Batson* of whether there was purposeful discrimination.

At oral argument, Respondent conceded that the Michigan trial court erred to the extent that it relied on the fact that the prosecutor did not strike Webb in reversing itself and finding that the prosecutor did not act with a discriminatory purpose. However, Respondent maintains that the district court improperly credited the Michigan trial court's initial finding of discriminatory purpose with the presumption of correctness under § 2254(e)(1) instead of crediting the Michigan trial court's subsequent finding that the prosecutor's race-neutral explanation was credible. Respondent also argues that, although the reasoning underlying the decision of the Michigan Court of Appeals was contrary to the Supreme Court's decision in *Hernandez*, the writ should not have been granted because the Michigan Court of Appeals reached the proper result.

Petitioner responds that the district court was correct when it found that the Michigan trial court erred. Petitioner claims that the district court properly considered the totality of the circumstances, including the trial judge's comments and

actions over a two-day period. Petitioner also argues that because a *Batson* error is structural, the distinction Respondent draws between the Michigan Court of Appeals' application of *Batson* and its ultimate conclusion is irrelevant. For the reasons that follow, we agree.

The trial court's factual findings made in support of its ultimate ruling that Petitioner failed to establish a *Batson* violation with regard to Bowden are, at their core, based on nothing more than the prosecution's decision not to raise a peremptory challenge to a subsequently selected African-American venire member, thereby [*434] permitting him to remain on the jury. Indeed, the trial court's explanation for changing its previous finding that Petitioner had demonstrated that the prosecutor had impermissibly challenged Bowden on the basis of race was based on the prosecution's subsequent examination of Webb, and the court's conclusion that the prosecutor's conduct during this examination somehow rendered the challenge to Bowden "more credible." These findings are short-sighted and fly in the face of the spirit and purpose of *Batson*.

The very foundation upon which *Batson* rests is the unquestioned premise that while "a defendant has no right to a petit jury composed in whole or in part of persons of his own race[,] . . . the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86 (internal quotations, citations, and footnote omitted). Thus, without more, the prosecutor's decision to select a subsequent African-American juror from the venire does nothing to cure the wrong committed under *Batson* in excluding Bowden because of his race. Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*. Recently, this Court reached precisely this conclusion

when we rejected the proposition that "the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others." *United States v. Harris*, 192 F.3d 580, 587 (6th Cir. 1999). n2 We therefore find the Michigan trial court's findings and conclusion in this regard to be an unreasonable application of *Batson*, considering that the trial court reconsidered and reversed its initial conclusion that the prosecution had discriminated in striking Bowden solely based on the subsequent seating of another African-American venire member.

---------- ---- Footnotes - - - - - - - - - - - - - - -

n2 Indeed, on direct review or on pre-AEDPA habeas review, this Court and our sister circuits have held that the presence of one or more African-American venire members on the jury, standing alone, does nothing to preclude a valid claim under *Batson*. See *Harris*, 192 F.3d at 587; *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) ("Although one black person was ultimately empaneled, the mere presence of a single black on the jury would not necessarily prevent a finding of a *prima facie* case." (citation and internal quotation marks omitted)); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("We emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) (same). In addition, although the decisions of this Court may be interpreted to allow consideration of the ultimate composition of the jury in reviewing a *Batson* claim, see *United States v. Tucker*, 90 F.3d 1135, 1142 (6th Cir. 1996) and *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1522 (6th Cir. 1988), these cases in no way may be interpreted as standing for the proposition that the presence of an African-American jury member is sufficient to justify the prosecution's discriminatory strike of another African-American venire member. See *Harris*, 192 F.3d at 587 n.1 ("Both *Tucker* and

Sangineto-Miranda discuss a number of relevant factors, and neither offers support for the conclusion that the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others.").
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The decision of the Michigan Court of Appeals to affirm the trial court was an unreasonable application of the Supreme Court's decisions in *Batson* and *Hernandez*. The failure to identify any precedent from the United States Supreme Court in rendering its decision is not the fatal flaw in that court's decision. See *Early v. Packer*, 537 U.S. 3, 154 L. Ed. 2d 263, 123 S. Ct. 362, 365 (2002) [*435] ("Avoiding the[] pitfalls [of being "contrary to" or an "unreasonable application of" Supreme Court precedent] does not require citation of our cases--indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."). Rather, it is the Michigan Court of Appeals's finding that the Petitioner failed to establish a *prima facie* case of discrimination that renders the court's decision unreasonable under Supreme Court precedent. The Supreme Court made clear in *Hernandez* that "once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court had ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." 500 U.S. at 359. Accordingly, because the trial court here had ruled on the ultimate question under *Batson*--whether Petitioner had established intentional discrimination--when it concluded that Petitioner had not demonstrated that the reasons for the strike of Bowden proffered by the prosecution were pretextual, the Michigan Court of Appeals acted unreasonably under Supreme Court precedent set out in Hernandez when it rested its holding on an issue that had become moot.

We, therefore, hold that the district court did not err in concluding that the decisions of the Michigan state courts were an unreasonable application of Supreme Court precedent under *Batson* and *Hernandez*, and in granting Petitioner's application for writ of habeas corpus.

IV. *Doyle v. Ohio Claim*

A. Relevant Facts

At trial, during the prosecutor's direct examination of Michael Cischke, the officer who interrogated Petitioner following his arrest, the following exchange took place.

Mr. Walton: . . . In addition to collecting this physical evidence, you also had the opportunity to speak with the defendant, correct?

Mr. Cischke: Yes.

Mr. Walton: You advised him of his Constitutional Rights?

Mr. Cischke: Yes.

Mr. Walton: Did he give you a statement of the events.

Mr. Cischke: No.

Mr. Walton: Did he give you any statements?

Mr. Cischke: No.

Mr. Walton: While in your custody did he make any comments to you?

Mr. Cischke: Yes, he did.

Mr. Walton: Do you recall the nature of those comments?

Mr. Cischke: They had to do with the fact that his attorney advised him not to say anything, to take the Fifth. It had to do with the fact that he--he didn't want to talk to us or he refused to talk to us. We tried to talk to him, but he asked us--we asked him if he would be--whether or not he was going to take his attorney's advise and--and remain silent and he didn't answer that question. He did become angry. We tried to make him more comfortable by taking off the set of handcuffs. He advised us against doing that. At one point he even tipped over the table that we were using in the interview room, um, for whatever reasons. He was frustrated or angry or whatever.

The record does not include the transcript of the discussion that followed this [*436] exchange. However, it is undisputed that Petitioner's trial counsel did not object to this line of questioning.

On appeal, the Michigan Court of Appeals noted that to the extent the prosecutor improperly introduced evidence that Petitioner exercised his right to remain silent after being advised of his *Miranda* rights, no objection to this evidence was made in the trial court and, therefore, this claim was not preserved for appeal. See *People v. Lancaster*, 1998 Mich. App. LEXIS 1781, *4, No. 184033 (Mich. Ct. App. June 23, 1998). Alternatively, the Michigan Court of Appeals found that any error that did result was harmless because the prosecutor elicited the allegedly improper testimony only once and did not raise it in his closing, the defendant elicited the same testimony from another witness, and the evidence was, in any event, not relevant to the central issue in the case--whether Petitioner was

insane. *Id.* In rendering its decision, the Michigan Court of Appeals did not cite to any Supreme Court precedent.

Petitioner has not filed a notice of appeal with respect to the *Doyle* issue, see Fed. R. App. P. 22(b)(1), nor has he obtained a certificate of appealability from the district court or this Court, see 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1), (2); *Slack v. McDaniel*, 529 U.S. 473, 484-85, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000). n3

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n3 We decline Respondent's invitation to establish a rule of law that, to preserve for appeal an issue decided adversely to an otherwise-successful habeas petitioner, the petitioner must lodge a cross-appeal. This Court has not previously addressed this issue and there is little authority to support such a rule.
- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

B. Legal Standard

Because only claims adjudicated on the merits in state court proceedings are cognizable on habeas review, this Court generally may not review claims that were not substantively decided by state courts.

When a habeas petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review.

Seymour v. Walker, 224 F.3d 542, 549-50 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977); *Picard v. Connor*, 404 U.S. 270, 275-78, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971)), *cert.*

denied, 532 U.S. 989 (2001). "A petitioner may avoid this procedural default only by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." 224 F.3d at 550 (citing *Sykes*, 433 U.S. at 87, 90-91).

This Court applies a four-factor test to determine if a claim has been procedurally defaulted:

> First, the court must determine whether there is such a procedural rule that is applicable to the claim at issue and whether the petitioner did, in fact, fail to follow it. Second, the court must decide whether the state courts actually enforced its procedural sanction. Third, the court must decide whether the state's procedural forfeiture is an "adequate and independent" ground on which the state can rely to foreclose [*437] review of a federal constitutional claim. "This question will usually involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." And, fourth, the petitioner must demonstrate, consistent with *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 . . . (1977), that there was "cause" for him to neglect the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Greer v. Mitchell, 264 F.3d 663, 672-73 (6th Cir. 2001) (internal citations omitted), *cert. denied*, 535 U.S. 940 (2002); see also *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) (establishing standard for reviewing whether an issue has been procedurally defaulted).

C. Analysis

The district court found Petitioner's Doyle claim to have been procedurally defaulted. See *Lancaster v. Adams*, 2001 U.S. Dist. LEXIS 25143, No. 00-CV-70691-DT at 10 (E.D. Mich. Sept. 25, 2001) This finding was based on the ruling of the Michigan Court of Appeals that the issue had "not been preserved for appeal due to defendant's failure to object below." *Id.* Alternatively, the Michigan Court of Appeals found that, even assuming that Petitioner was correct "that the prosecutor only elicited the allegedly improper testimony once and did not raise it in closing argument, that defendant elicited the same testimony from another witness, and that the evidence was irrelevant to the issue of sanity," any error that occurred was harmless. *Id.*

Petitioner has not demonstrated that he is entitled to review of the *Doyle* claim under the applicable standard. First, Michigan has a contemporaneous objection rule. See *People v. Schutte*, 240 Mich. App. 713, 613 N.W.2d 370, 377 (Mich. Ct. App. 2000) ("Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error."). This rule applies in this case. The Michigan Court of Appeals found that Petitioner did not comply with this rule and that no plain error occurred. Second, Michigan courts enforce this rule. See, e.g., *id.* Third, this was an "adequate and independent" ground on which Michigan may rely to foreclose review of Petitioner's *Doyle* claim. There are significant state interests in requiring contemporaneous objections to be made to *Doyle* errors. Cf. *Lee v. Kemna*, 534 U.S. 362, 377, 151 L. Ed. 2d 820, 122 S. Ct. 877 (2002) ("The State's contemporaneous objection rule, we observed, 'serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.'" (quoting *Osborne v. Ohio*, 495 U.S. 103, 123, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990))).

Accordingly, under the fourth prong of the applicable standard, Petitioner must show cause for this procedural error and that he was prejudiced by such error. Petitioner argues that the failure to object is inconsequential because an instruction to the jury could not have cured the error. Nonetheless, Petitioner claims, as he did before the Michigan Court of Appeals, that the cause for his not raising this issue was that his trial counsel [**31] was ineffective. Moreover, Petitioner argues that the *Doyle* error caused him actual prejudice and was not harmless, contrary to the findings of the Michigan Court of Appeals.

The Michigan Court of Appeals found that Petitioner's ineffective-assistance-of-counsel claim had not been raised in the trial court and limited its review to "mistakes apparent on the record." See *People v. Lancaster*, 1998 Mich. App. LEXIS 1781, *5, No. 184033 (Mich. Ct. App. June 23, 1998). [*438] Although the district court addressed the merits of Petitioner's claim that his trial counsel's ineffectiveness was the cause of his failure to raise the *Doyle* claim in the Michigan trial court, the district court noted preliminarily that, to the extent that Petitioner procedurally defaulted this ineffective-assistance claim in state court, he may not rely on it to show "cause" for the procedural default of his *Doyle* claim. *Id.* We agree.

The Supreme Court recently held "that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted [although] that procedural default may . . . itself be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim." *Edwards v. Carpenter*, 529 U.S. 446, 453, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000). Because Petitioner's ineffective-assistance-of-counsel claim is procedurally defaulted, Petitioner must show cause and prejudice for that default in order to rely on this claim to establish cause for procedurally defaulting with respect to the *Doyle* claim. Petitioner has failed to establish the necessary cause and prejudice with respect to his ineffective-assistance

claim. Finally, no miscarriage of justice will result from our failure to address the merits of Petitioner's procedurally defaulted *Doyle* claim.

V. Conclusion

For the reasons stated above, we AFFIRM the judgment of the district court granting the Petition.

OPINION: ORDER

BURT R. LANCASTER, Petitioner,

v.

STANLEY ADAMS, Respondent.

CASE NO. 00-CV-70691-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2001 U.S. Dist. LEXIS 25143

September 25, 2001, Decided
September 25, 2001, Filed

SUBSEQUENT HISTORY: Affirmed by Lancaster v. Adams, 2003 U.S. App. LEXIS 5774 (6th Cir.) (6th Cir. Mich., 2003)

PRIOR HISTORY: People v. Lancaster, 459 Mich. 951, 616 N.W.2d 172, 1999 Mich. LEXIS 291 (1999)

COUNSEL: For BURT LANCASTER, petitioner: Kenneth M. Mogill, Mogill, Posner, Detroit, MI.

For STANLEY ADAMS, respondent: Brenda E. Turner, Brad H. Beaver, Michigan Department of Attorney General, Lansing, MI.

JUDGES: AVERN COHN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: AVERN COHN

OPINION: OPINION AND ORDER CONDITIONALLY GRANTING WRIT OF HABEAS CORPUS

I. Introduction

This is a habeas corpus action under 28 U.S.C. § 2254. Petitioner Burt R. Lancaster has been convicted of first-degree murder, MICH. COMP. LAWS § 750.316, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b. The convictions arose from an incident in 1993 when Petitioner shot and killed his girlfriend, Toni King, in the parking lot of a shopping plaza in Southfield, Michigan. Petitioner did not testify at trial. His defenses were insanity and diminished capacity.

The trial court sentenced Petitioner to two years in prison for the felony firearm conviction and to a consecutive term of life imprisonment for the murder conviction. n1 The Michigan Court of Appeals affirmed Petitioner's [*2] conviction in an unpublished, per curiam opinion. See *People v. Lancaster*, 1998 Mich. App. LEXIS 1781, No. 184033 (Mich. Ct. App. June 23, 1998). The Michigan Supreme Court denied leave to appeal. See *People v. Lancaster*, 459 Mich. 951, 616 N.W.2d 172, (Mich. Sup. Ct. 1999).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Petitioner was convicted in Oakland County Circuit Court. He is confined at the Riverside Correctional Facility in Ionia, Michigan.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On February 8, 2000, Petitioner filed the pending habeas corpus petition through counsel. He alleges that:

> I. While the Michigan Courts found that Petitioner had not made out a *prima facie* showing of purposeful racial discrimination in the prosecution's exercise of its peremptory challenge, their decisions were contrary to and an unreasonable application of the decision in *Batson v. Kentucky*.
>
> II. Petitioner was denied his Fifth Amendment right to remain silent and his right to due process of law when the prosecutor elicited testimony that he had remained silent during custodial questioning on the advice of counsel [*3] and then used that fact as substantive evidence of Petitioner's sanity.
>
> III. Prosecutorial misconduct during argument and presentation of the evidence denied Petitioner due process of law.
>
> IV. When it denied the defense request to forego instructing the jury that the intent to kill may be inferred from the use of a gun, the trial court abused its discretion and denied Petitioner a fair trial because the instructions as a whole negated the diminished capacity defense.
>
> V. Petitioner was denied his right to effective assistance of counsel and a fair trial.
>
> VI. The constitutional errors identified, when cumulated, establish that Petitioner suffered actual prejudice.

Respondent argued in his responsive pleading that Petitioner's claims lacked merit. He asserted for the first time at oral

arguments, which were held on July 12, 2001, that some of Petitioner's claims are procedurally defaulted and, therefore, barred from review by this Court.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("the AEDPA"), the Court may grant the writ of habeas corpus only if the state court's adjudication of [*4] Petitioner's claims on the merits—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

For the reasons which follow, the Court finds that the state courts' rulings regarding Petitioner's *Batson* claim resulted in a decision that was contrary to and/or an unreasonable application of Batson and therefore the writ must conditionally issue on this claim. Petitioner's remaining claims lack merit.

II. Discussion

A. The *Batson* Claim

During *voir dire*, the prosecutor used a peremptory challenge to strike an African American, [*5] Jackie Bowden, from the

venire. Defense counsel claimed that the peremptory challenge was racially motivated. The trial court initially sustained defense counsel's objection, but later reversed itself and permitted the prosecutor to exercise a peremptory challenge to excuse Bowden. The Michigan Court of Appeals concluded that there was no prima facie showing of purposeful discrimination and, therefore, no error in the trial court's ruling.

Petitioner, who is an African American, claims that the state appellate court's decision was contrary to, and an unreasonable application of, *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), because the appellate court considered only whether he established a *prima facie* case under *Batson*. According to Petitioner, the question is whether he established by a preponderance of the evidence that the peremptory strike was intentionally discriminatory.

1. Supreme Court Precedent

"The Constitution's guarantee of equal protection ensures that a party may not exercise a peremptory challenge to remove an individual on account of that person's race." *McCurdy v. Montgomery County, Ohio*, 240 F.3d 512, 521 (6th Cir. 2001) [*6] (citing *Batson*, 476 U.S. at 79, and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31, 114 L. Ed. 2d 660, 111 S. Ct. 2077(1991)). Courts must engage in "a three-step process [when] evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause ... First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race." *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991) (citing *Batson*, 476 U.S. at 96-98).

To establish a *prima facie* case of purposeful discrimination in the selection of a petit jury, the defendant first must show that he is a member of a cognizable racial group, and that the

prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must [*7] show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury ... raises the necessary inference of purposeful discrimination.

Batson, 476 U.S. at 96 (internal citations omitted).

"Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez*, 500 U.S. at 358-59 (citing *Batson*, 476 U.S. at 97-98). Third, "the challenging party must demonstrate that the purported explanation is merely a pretext for a racial motivation," *McCurdy*, 240 F.3d at 521, and "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 358 (citing *Batson*, 476 U.S. at 98).

2. The State Court Proceedings

There was one other African-American (Michael Hurd) seated in the jury box when Jackie Bowden was called as a prospective [*8] juror. The trial court questioned Bowden as follows:

THE COURT: With regard to Mr. Bowden. How are you today, sir?

JUROR BOWDEN: All right.

THE COURT: Where do you work, sir?

JUROR BOWDEN: I drive a semi-truck for a flea market.

THE COURT: For?

JUROR BOWDEN: A western flea market.

THE COURT: Okay. And where does your wife work?

JUROR BOWDEN: (inaudible)

THE COURT: She worked as a secretary?

JUROR BOWDEN: (inaudible)

THE COURT: Where did -- where?

JUROR BOWDEN: She was a receptionist at --

THE COURT: Okay. What kind of an outfit was it?

JUROR BOWDEN: It was like a motel.

THE COURT: Okay. Now, are you familiar with the scene of the alleged crime?

JUROR BOWDEN: Um, Yes.

THE COURT: Okay. Do you know any of the individuals here?

JUROR BOWDEN: Um, no.

THE COURT: Can you be fair[?]

JUROR BOWDEN: Yea, I can be fair.

THE COURT: Would you want you as a juror?

JUROR BOWDEN: Um, I think so.

THE COURT: That's an underwhelming response. We'll delve into that. Can you be fair?

JUROR BOWDEN: Yea.

THE COURT: Are you honest?

JUROR BOWDEN: Yes, I'm honest.

THE COURT: Can you listen to both sides?

JUROR BOWDEN: (no verbal response).

THE COURT: If worse comes -- if the [*9] prosecution proves their case beyond a reasonable doubt, based upon the law I give you, can you find the defendant guilty?

JUROR BOWDEN: (no verbal response).

THE COURT: To the best of your ability can you assure me that you can find him guilty?

JUROR BOWDEN: Yes.

THE COURT: If, however, the prosecution does not meet its burden, can you find the defendant not guilty?

JUROR BOWDEN: Yes.

THE COURT: Can you sit in judgment on a fellow human being?

JUROR BOWDEN: Yes.

THE COURT: Can you swear to me, swear to the defendant, and swear to the prosecution that you can be fair?

JUROR BOWDEN: Yes.

THE COURT: Can you swear and assure ... us that you'll listen to the testimony and make your decision only on the facts and evidence and the law that I give to you?

JUROR BOWDEN: I swear.

THE COURT: Can you commit to us that your decision will be based only on the facts and not because you like someone or you don't like somebody?

JUROR BOWDEN: Yes.

THE COURT: That's what it's all about. Any questions?

MR. WALTON [the prosecutor]: No questions from the prosecution.

THE COURT: Any questions, please?

MR. HENRY [defense counsel]: I have none, your Honor.

THE COURT: Okay. Thank you. [*10]

Tr. I at 106-09. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n2 "Tr." refers to the transcript of trial, which consists of five separately paginated volumes (I - V).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After the trial court questioned two other jurors, the prosecutor attempted to use a peremptory strike against Bowden. Defense counsel apparently objected at a bench conference, and the trial court excused the jurors so that it could conduct a hearing on the *Batson* challenge. See *id.* at 114-16.

The hearing began with the trial court explaining that Mr. Bowden was an African-American and that the prosecutor had found Bowden's responses too weak with regard to the prosecution. The prosecutor did not respond to the trial court's comments by arguing that Petitioner had failed to make out a *prima facie* case of racial discrimination. Instead, he explained his peremptory strike by asserting that the officer in charge, who also was an African-American, had confided to him that he did not feel comfortable with Bowden. The prosecutor and officer in charge had agreed [*11] that, "based upon [Bowden's] responses, his demeanor, [and] his attitude, that it would be better for the prosecution's case to exclude him. Not on the basis of race, but on the basis of his responses." *Id.* at 118.

The trial court noted that, excluding Bowden would leave only one African American on the panel, and defense counsel pointed out that Bowden had said he could be fair and his responses indicated that he could be fair. The trial court then expressed dissatisfaction with the prosecutor's explanation and ruled that Bowden should remain on the panel. The trial court's ruling was based on Bowden's responses to its questions. See *id.* at 118-20.

After another African American (Keith Webb) was called to sit in the jury box, the prosecutor renewed his objection to Bowden, and the trial court excused Bowden without explanation. See *id.* at 128, 136-37.

On the following day, without further hearing from either the prosecution or Petitioner's counsel, the trial court summarized what had happened:

> The Court is not satisfied with the record made with regard to the *Batson* challenge of Mr. Bordon (sic). We were rushed [*12] to pick the jury. Mr. Walton [the prosecutor], at the time, wanted to excuse Mr. Bordon (sic), who was juror number 9, a black gentleman. He was not satisfied with the way in which the answers were given and he believed that he was not favorable to the prosecution. A hearing was held in chambers. The Court, at that time, was not satisfied with the explanation as given by Mr. Walton.
>
> Subsequent to that, as the process continued, there was another juror, another African-American, who was selected, Mr. Keith Webb, which would have been in seat five. Mr. Walton renewed his objection again to Mr. Bordon (sic). Mr. Sowell [defense counsel] vigorously objected to it, saying that if it was right then, it's right now, in terms of the ruling of the Court. The Court reflected -- the Court, while not satisfied with the original explanation given Mr. -- given by Mr. Walton with regard to Mr. Bordon (sic), how -- the Court, however felt that that explanation was given more credibility by the subsequent examination of the other jurors. The Court then reconsidered it's (sic) opinion, in light of the examination, and then felt, because of the conduct of the prosecution and the subsequent juror [*13] that it was legitimate, but I wanted to put that --

> Mr. Sowell, on behalf of the defendant, objected. That objection is still noted.

Tr. II at 3-4. The Michigan Court of Appeals subsequently concluded that there was no prima facie showing of purposeful discrimination, and, therefore, the trial court correctly ruled that the prosecutor could dismiss Bowden.

3. Analysis

The trial court's decision reversing its ruling on the basis of the prosecution's subsequent examination of jurors and the seating of another African-American on the panel was wrong. The fact that another African-American took a seat in the jury box, a fact which apparently greatly influenced the trial court, was irrelevant. See *Batson*, 476 U.S. at 95 (stating that "[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'") (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, n. 14, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)); *Greer v. Mitchell*, 264 F.3d 663, 2001 WL 1001080, at *13 n.4 (6th Cir. 2001) [*14] (stating that, "simply because blacks are ultimately seated on a jury does not preclude a *Batson* challenge"). n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 Two African Americans (Michael Hurd and Keith Webb) remained on the jury panel and deliberated Petitioner's case. See Tr. I at 117-18; Tr. II at 3. Alvin Mitchell also was a racial minority, but he was excused by the trial court after saying that he would not want himself on the jury. See Tr. I at 86-90, 117.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

That the prosecution subsequently permitted another African-American to be seated was also irrelevant. The trial court was required to decide whether Petitioner had established

purposeful discrimination after the prosecutor initially articulated his explanation. See *Batson*, 476 U.S. at 98 (noting that the trial court has the duty to determine if the defendant has established purposeful discrimination after the prosecutor articulates an explanation); *Purkett v. Elem*, 514 U.S. 765, 767, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995) [*15] (stating that "if a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination."). The trial court had before it all the evidence it needed to decide whether prohibited discrimination had occurred. *Durant v. Strack*, 151 F. Supp. 2d 226, 237 (E.D. N.Y. 2001) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)). When "a party's race-neutral explanation for its actions is rejected and results in a finding of purposeful discrimination, the court may not disregard that finding and revert back" to a previous step in the *Batson* analysis. *Id.* at 242.

The trial court initially was not convinced by the prosecutor's explanation for the peremptory strike. The trial court's implicit factual determination concerning the prosecutor's credibility on the question of discriminatory intent is entitled to a presumption of correctness. 28 U.S.C. § 2254(c)(1); *Hernandez*, 500 U.S. at 364-66; [*16] *Purkett*, 514 U.S. at 769; *Batson*, 476 U.S. at 98 n.21. By subsequently "allowing the peremptory challenge to stand, after having found it to be tainted by purposeful discrimination, the trial court effectively endorsed that discrimination and unreasonably deviated from the Supreme Court's decision[] in *Hernandez* ...." Durant, 151 F. Supp. 2d at 242. The trial court cannot look at the ultimate composition of a jury when deciding whether or not *Batson* has been violated or to justify a finding that there was no *Batson* violation.

The court of appeals also deviated from *Hernandez*. It erred by looking only at whether Petitioner had established a *prima facie* showing of intentional discrimination. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges, and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359. The question for the court of appeals as a reviewing court was whether Petitioner had established by a preponderance [*17] of the evidence that the peremptory strike was intentionally discriminatory. *United States v. Tucker*, 90 F.3d 1135, 1142 (citing *Kelly v. Withrow*, 25 F.3d 363, 367 (6th Cir. 1994)); *Rankins v. Carey*, 141 F. Supp. 2d 1231, 1239 (C.D. Cal. 2001). And, as previously explained, the court of appeals was required to defer to the trial court's factual findings and credibility determinations. *Batson*, 476 U.S. at 98 n.21

Thus, the combined actions of the trial court and court of appeals in rejecting Petitioner's *Batson* claim resulted in a decision that was contrary to and an unreasonable application of, clearly established federal law as determined by the Supreme Court. Furthermore, because a *Batson* error is a structural error, which is not subject to harmless error analysis. *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991)). Accordingly, Petitioner is entitled to a conditional writ of habeas corpus based on his *Batson* claim.

B. Petitioner's Remaining Claims

1. The Right to Remain Silent

Petitioner's [*18] second claim is that the prosecutor deprived him of his Fifth Amendment rights when he elicited testimony that Petitioner remained silent after an officer advised him of

his constitutional rights. Petitioner alleges that the prosecutor unfairly used the evidence in his case in chief to imply guilt, to impeach his insanity defense, and as substantive evidence of sanity.

The Fifth Amendment states that "no person shall be ... compelled in any criminal case to be a witness against himself ...." U.S. CONST. amend. V. n4 To protect this right, an individual who is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning ... must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 478-79, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n4 The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*19]

Although "the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). Consequently, it is fundamentally unfair and a deprivation of due process to use a defendant's silence, following *Miranda* warnings, as impeachment evidence, *id.* at 619, as substantive evidence of sanity, *Wainwright v. Greenfield*, 474 U.S. 284, 295, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986), or as substantive evidence of guilt, *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965).

The disputed comments in this case occurred during the prosecutor's direct examination of the officer who interrogated Petitioner following Petitioner's arrest. The colloquy reads:

Q. [the prosecutor]: Now, Officer, ... you ... had the opportunity to speak with the defendant, correct?

A. [the officer]: Yes.

Q. You advised him of his Constitutional Rights?

A. Yes.

Q. Did he give you a statement as to the events?

A. No.

Q. Did he give [*20] you any statements?

A. No.

Q. While in your custody did he make any comments to you?

A. Yes, he did.

Q. Do you recall the nature of those comments?

A. They had to do with the fact that his attorney advised him not to say anything, to take the Fifth. It had to do with the fact that he -- he didn't want to talk to us or he refused to talk to us. We tried to talk to him, but he asked us -- we asked him if he would be -- whether or not he was going to take his attorney's advice and

-- and remain silent and he didn't answer that question. He did become angry. We tried to make him more comfortable by taking off the set of handcuffs. He advised us against doing that. At one point he even tipped over the table that we were using in the interview room, um, for whatever reasons. He was frustrated or angry or whatever.

Q. Now, this was after he was advised that he was being charged with assault with intent to commit murder or murder?

A. Well, after he'd been arrested for that, yes.

Tr. II at 152-54.

The Michigan Court of Appeals noted in its opinion that Petitioner did not object at trial to the direct examination quoted above. The court of appeals [*21] concluded that, because of the failure to object at trial, Petitioner did not preserve his claim for appellate review. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n5 The court further concluded that any error in the prosecutor's use of Petitioner's post-arrest silence was harmless.
- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

a. The Doctrine of Procedural Default

When a habeas petitioner fails to obtain consideration of a claim by a state court ... due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review. A petitioner may avoid this procedural default only by showing

that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case.

Seymour v. Walker, 224 F.3d 542, 549-50 (6th Cir. 2000), *cert. denied*, 532 U.S. 989, 121 S. Ct. 1643, 149 L. Ed. 2d 502 (2001); *accord Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); [*22] *Harris v. Reed*, 489 U.S. 255, 263, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989).

In *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit set forth a four-part test for determining whether a prisoner's constitutional claim is procedurally defaulted and barred from habeas review:

First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction -- that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must consider whether the procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. See *id.* A procedural rule is adequate only when it is firmly established and regularly followed at the time it was applied. See *Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998). The rule would be an independent basis for disposition of a case if the [*23] state courts actually relied on the procedural bar. See *Harris v. Reed*, 489 U.S. 255, 261-62, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner's procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice. See *Maupin*, 785 F.2d at 138.

Williams. v. Coyle, 260 F.3d 684, 2001 WL 920272, at *5 (6th Cir. 2001).

b. The Rule in Question

In Michigan, appellate review of improper prosecutorial conduct is generally precluded, absent an objection, because the lack of an objection deprives the trial court of an opportunity to cure the error. *People v. Ullah*, 216 Mich. App. 669, 679, 550 N.W.2d 568 (1996)(citing *People v. Stanaway*, 446 Mich. 643, 687, 521 N.W.2d 557 (1994)). Petitioner violated this rule by not objecting when the prosecutor elicited testimony regarding Petitioner's silence during interrogation [*24] by the police. The Michigan Court of Appeals relied on the procedural rule by noting that the issue had not been preserved for appeal due to Petitioner's failure to object below.

Requiring a contemporaneous objection was an adequate and independent state ground for denying consideration of Petitioner's claim. See *Isaac v. Engle*, 456 U.S. 107, 135, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982) (holding that criminal defendants who failed to comply with a state's contemporaneous-objection rule and who failed to demonstrate cause for the default were barred from asserting that claim under 28 U.S.C. § 2254). Moreover, the procedural rule in question was firmly established and regularly followed at the time it was applied. Therefore, in order to obtain habeas review of his claim, Petitioner must show cause for his failure to object at trial and resulting prejudice or a miscarriage of justice.

c. "Cause and Prejudice"

Petitioner alleges that defense counsel was "cause" for his procedural default. Petitioner raised ineffective assistance of counsel as an independent claim in the Michigan Court of

Appeals. The court of appeals limited its review [*25] of Petitioner's ineffective-assistance-of-counsel claim to mistakes apparent on the record because Petitioner did not raise his claim of ineffective assistance in the trial court. To the extent that Petitioner procedurally defaulted his independent ineffective-assistance-of-counsel claim, he may not assert ineffective assistance of counsel as cause for his procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 452, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000); *Jacobs v. Mohr*, 265 F.3d 407, 2001 WL 1024047, at *9 (6th Cir. 2001). n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n6 See infra Section II.E.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In the alternative, Petitioner has not shown that his attorney's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result [*26] of the proceeding would have been different." *Id.* at 694.

The Court agrees that defense counsel's failure to object to evidence of Petitioner's silence when interrogated by the police constituted deficient performance. "Although the contours of the privilege against self-incrimination may sometimes be unclear, that a defendant's silence cannot be used as substantive evidence against him at trial is a fundamental aspect of the privilege." *Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir.), *cert. denied sub nom Bagley v. Combs*, 531 U.S. 1035, 148 L. Ed. 2d 533, 121 S. Ct. 623 (2000). Petitioner's attorney should have realized that evidence of Petitioner's silence was constitutionally suspect, and he should have lodged an objection on that basis. See *id.* Counsel's failure to object is inexplicable, and the Court knows of no strategic reason for the omission.

Nevertheless, Petitioner's post-arrest silence was irrelevant to the issue of insanity or diminished capacity at the time of the offense. In fact, the prosecutor did not even mention Petitioner's post-arrest silence in his closing argument. Moreover, the evidence against Petitioner [*27] was substantial. He did not dispute that he killed Toni King, n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n7 The primary issues at trial were whether Petitioner was capable of forming an intent to kill and whether he actually intended to kill King. Toni King's sister and best friend testified that, some time before the day of the shooting, Petitioner had expressed an intent to kill King. See Tr. II at 93 (Julic Garner's testimony); Tr. III at 62-63 (Yolanda Williams Davis's testimony).

Petitioner's mother, Valera Lancaster, testified that she informed a 911 operator on the day of the shooting that Petitioner had taken her gun and said that he was going to kill himself and his girlfriend. Mrs. Lancaster claimed that she mentioned Petitioner's intent to kill his girlfriend in order to get a quicker response from the police. However, Mrs. Lancaster informed the responding officers that Petitioner had said he intended to kill his girlfriend, and she gave Toni King's name and work address to the police. See Tr. II at 160-64, 174; Tr. III at 47-48.

Meanwhile, King and her friend, Julic Garner, had decided to drive to the bank on their lunch hour. They noticed Petitioner in the car behind them. Petitioner followed the women and invited them to lunch when the three of them reached the bank and the women had completed their banking transactions. The three of them proceeded to the restaurant, the women in one car, and Petitioner in his car. In the restaurant parking lot, the women got out of their car, and Petitioner called King over to his car. Petitioner proceeded to point a gun at King from inside

his car. He shot her about three times, and then drove away. See T II at 69-91, 114-15. Petitioner later called his mother and said that he had shot King and intended to shoot himself. Approximately twelve hours after the shooting, Petitioner surrendered to a police officer with whom he was acquainted. See *id.* at 144-45, 215-17; Tr. III at 52.

Defense counsel produced forensic psychiatrist Emanuel Tanay as its expert witness. Dr. Tanay testified that Petitioner suffered from a severe, chronic illness known as bipolar disorder or manic depression, which is characterized by fluctuations between manic activity and profound depression. Dr. Tanay also believed that Petitioner had brain damage from an accident and exhibited borderline intelligence. Dr. Tanay opined that Petitioner was unable to appreciate the wrongfulness of his conduct or adhere to the requirements of the law due to his mental illness. Dr. Tanay also testified that Petitioner had been unable to form a rational intent to kill and that Petitioner was driven or compelled to act as he did by his mental illness. Dr. Tanay was convinced that Petitioner had stopped using cocaine well before the day of the shooting. See Tr. III at 167-73; Tr. IV at 19, 30-33, 64-67.

Clinical psychologist Gail Farley testified as a rebuttal witness. Dr. Farley testified that, during her examination of Petitioner, he claimed not to remember anything about the incident. Petitioner described auditory hallucinations to her, but he did not attribute the shooting to the voices, and his descriptions of the hallucinations were unlike those usually reported by persons suffering from those symptoms. Dr. Farley could not be sure if Petitioner's depression was a result of his mental disorder or the use of cocaine because, in her opinion, the euphoria associated with cocaine use and the depression that follows withdrawal from cocaine mimic the symptoms of bipolar disorder. She decided that Petitioner was malingering about some of his symptoms, but probably not malingering about other things.

Dr. Farley concluded on the basis of test results that Petitioner was not mentally retarded or intellectually impaired to any significant degree. Dr. Farley determined from medical reports that Petitioner had not received a closed head injury during an accident in 1986. She opined that, regardless of whether Petitioner suffered from a mental illness, he was capable of understanding the wrongfulness of his behavior at the time of the offense. She therefore concluded that Petitioner was not legally insane. She also concluded that Petitioner was capable of forming intent at the time of the offense and, therefore, he did not experience diminished capacity. She noted that Petitioner's behavior had been very organized, goal directed, and connected with reality. See Tr. IV at 104-126, 154-58, 164, 190.

In summary, the testimony established that Petitioner had threatened to kill Toni King and that, on the day of the shooting, he acquired a gun, pursued her, shot her several times, and left the scene of the crime. There was considerable testimony about Petitioner's history of mental illness, but conflicting expert testimony concerning whether Petitioner was insane or incapable of forming intent at the time of the offense.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*28]

There is not a reasonable probability in light of the evidence presented at trial that, but for defense counsel's failure to object to the disputed testimony, the result of the proceeding would have been different. Thus, Petitioner has failed to demonstrate prejudice sufficient to overcome his procedural default of this claim.

d. Miscarriage of Justice

The remaining issue is whether the Court's failure to consider Petitioner's defaulted claim on the merits will result in a miscarriage of justice. The exception for fundamental

miscarriages of justice requires showing that "in light of ... new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995).

Petitioner has not presented the Court with any new evidence, and he has not demonstrated that, but for defense counsel's deficient performance, the jury would have acquitted him. Therefore, Petitioner's procedural default of not objecting to the prosecutor's use of evidence concerning his of evidence concerning his post-arrest silence bars substantive review of his *Doyle* claim. n8

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 Analyzed differently, the Doyle error could not have had a substantial and injurious effect or influence on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)). Therefore, the state court's finding of harmless error was not contrary to, an unreasonable application of, *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (holding that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"), and Petitioner has no right to habeas relief on the basis of his second claim. 28 U.S.C. § 2254(d)(1); *Barker v. Yukins*, 199 F.3d 867, 873 (6th Cir.) (concluding that a state court's determination of harmless error is unreasonable only if the error had a substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice), *cert. denied*, 530 U.S. 1229, 147 L. Ed. 2d 273, 120 S. Ct. 2658 (2000).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

2. Prosecutorial Misconduct [*29]

Petitioner's third claim is that conduct by the prosecutor during presentation of the evidence and closing arguments deprived him of due process of law. Specifically, Petitioner contends that the prosecutor appealed to the sympathy of the jury, vouched for the credibility of a witness, made statements unsupported by the evidence, misstated evidence and testimony, and mentioned excluded evidence to the press.

a. Prosecutorial Conduct to Which Petitioner did not Object

As previously explained, appellate review of improper prosecutorial conduct generally is precluded in the state courts, absent an objection. *Ullah*, 216 Mich. App. at 679. Petitioner did not object to several instances of alleged misconduct, and the Michigan Court of Appeals relied on Petitioner's failure to object at trial when adjudicating Petitioner's prosecutorial misconduct claim. The failure to object at trial was an adequate and independent state ground to foreclose review. Therefore, Petitioner must show cause for not objecting and resulting prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750 (1991).

Petitioner alleges that defense counsel's deficient actions [*30] were cause for his procedural error. To the extent that Petitioner's ineffective-assistance-of-counsel claim is itself procedurally defaulted, ineffective assistance of counsel cannot excuse his procedural default of failing to object to the prosecutor's conduct. *Carpenter*, 529 U.S. at 452; *Jacobs*, 2001 U.S. App. LEXIS 19971, at *9. n9 In the alternative, the Court concludes for the following reasons that the prosecutor's conduct did not rise to the level of a constitutional error and, therefore, defense counsel was not ineffective for failing to object to the conduct.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n9 See infra Section II.E.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

i. Appeal to the Jurors' Sympathy

Petitioner complains of the prosecutor's reference to the deceased victim's ten-year old child. The passing references were given no particular emphasis. See Tr. II at 10, Tr. V at 6. Defense counsel himself mentioned the victim's child in his own opening statement; he also elicited testimony about the child. See Tr. II at 15, 182-83; Tr. [*31] III at 77, 84. The prosecutor's brief references to the victim's child were not "so fundamentally unfair as to deny [Petitioner] due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). Moreover, the jurors were instructed that sympathy should not influence their decision. See Tr. V at 55.

ii. Vouching

Vouching occurred when defense counsel was cross-examining Julic Garner as to whether she knew if Toni King was planning to live with Petitioner before she died. Defense counsel asked Garner to search her soul and tell the absolute truth. The prosecutor objected, saying "She keeps on repeating the absolute truth. This witness has already been sworn. There's been no indication that she is lying." See Tr. II at 97.

Although prosecutors may not vouch for a witness's credibility, such statements constitute harmless error where the evidence against a defendant is otherwise strong. *Wilson v. Mitchell*, 250 F.3d 388, 399 (6th Cir. 2001). The evidence against Petitioner, as summarized above, was strong even without Julic Garner's testimony. Therefore, the prosecutor's statement that Julic Garner [*32] was speaking the truth did not so prejudice Petitioner as to constitute a denial of due process. *Donnelly*, 416 U.S. at 645.

iii. Stating Facts not in Evidence and Misstating Evidence

Petitioner alleges that the prosecutor misinterpreted testimony and made comments unsupported by the evidence when he said that: (1) Petitioner was a drug user and that he was suffering from cocaine withdrawal at the time of the killing; and (2) the jurors should not believe Petitioner's expert witness because the expert did not perform any blood or DNA tests on Petitioner. In fact, alleges Petitioner, (1) there was no evidence that he used cocaine or was withdrawing from it at the time of the shooting; and (2) his expert witness testified that there were no blood or DNA tests available to confirm a psychiatric diagnosis.

The jurors were instructed on how to evaluate testimony, including the testimony of expert witnesses. They were also instructed that the attorneys' questions, comments, and arguments were not evidence and that they should accept what the lawyers said only if the lawyers' comments were supported by the evidence or by their own common sense and knowledge. [*33] See Tr. I at 159, Tr. V at 57-60, 70-71. Therefore, the alleged misstatement of the evidence could not have prejudiced Petitioner to the extent that it denied him due process.

iv. Summary

Defense counsel was not ineffective for failing to object to the prosecutor's alleged misconduct because the disputed conduct did not deprive Petitioner of a fair trial. For the same reason, Petitioner was not prejudiced by the failure to object. A miscarriage of justice will not occur from the Court's failure to address Petitioner's claims on the merits because Petitioner has not shown that, "in light of ... new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. Therefore, Petitioner's failure to object to the prosecutor's conduct bars substantive review of his claims.

b. Prosecutorial Conduct to which Petitioner Objected

Petitioner's remaining claims about the prosecutor are not procedurally defaulted because he objected to the disputed conduct at trial. Petitioner alleges that the prosecutor misstated the evidence when he said that "known clinical studies" demonstrate that auditory [*34] hallucinations are not as detailed as the hallucinations described by Petitioner. The comment was not so egregious as to make the resulting conviction a denial of due process. *Donnelly*, 416 U.S. at 645. Moreover, defense counsel objected to the comment and pointed out that Dr. Gail Farley referred only to her experience in listening to other patients, not to any clinical studies. See Tr. V at 44-46.

Petitioner's final claim about the prosecutor is that the prosecutor informed the press of Petitioner's acquittal of a conspiracy charge in an unrelated case. The trial court had ruled that the parties could not admit evidence of the acquitted charge. See T I at 14.

The prosecutor explained, however, that he had disclosed the information to the press at the time of Petitioner's arraignment, and that, during trial, the press had reprinted the same information in another article. Although one of the jurors sitting on Petitioner's case read the article during Petitioner's trial, the trial court dismissed the juror, and none of the other jurors were affected by the incident. See Tr. III at 3-28. The prosecutor did not engage in misconduct, and the incident did [*35] not affect the fairness of the trial.

c. Summary

Portions of Petitioner's prosecutorial misconduct claim are barred from review by his state procedural error of failing to make a contemporaneous objection. His other claims about the

prosecutor lack merit. Accordingly, Petitioner's third claim does not warrant habeas corpus relief.

3. Jury Instructions

Petitioner's fourth claim is that the trial court abused its discretion and deprived him of a fair trial when it denied his request not to instruct the jury that the intent to kill may be inferred from the use of a gun. Petitioner asserts that the inferring intent instruction negated his defense of diminished capacity, the essence of which was that, due to mental illness, he was incapable of forming the required intent. According to Petitioner, a proper jury instruction would have explained that the jury must first determine whether Petitioner was capable of forming the necessary intent and then whether Petitioner actually did form that intent.

a. Procedural Default Analysis

State law requires defendants to cite authority for their arguments in order to avoid having their arguments waived on appeal. [*36] See *People v. Weathersby*, 204 Mich. App. 98, 113, 514 N.W.2d 493 (1994). Petitioner violated this rule by not citing any specific authority for the argument that a trial court may not give the inferring intent jury instruction in cases where the defense is diminished capacity.

The Michigan Court of Appeals relied on this rule by deeming Petitioner's jury-instructions claim waived because he failed to cite any authority in support of his contention. The state court's reliance on Petitioner's failure to comply with the rule was an adequate and independent basis to foreclose review because it was firmly established and regularly followed at the time of Petitioner's appeal.

Petitioner has not alleged "cause" for his appellate error and resulting prejudice. He merely claims that the state appellate

court ignored his reference to *Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975), cited in *People v. Ramsey*, 422 Mich. 500, 510, 375 N.W.2d 297 (1985), for the proposition that "[a] fair trial is a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Petitioner cited [*37] *Drope* in his appellate argument about the cumulative effect of the errors. He did not cite any specific authority for his claim that the trial court erred when it read the standard jury instruction about inferring intent.

Furthermore, this Court's failure to review Petitioner's claim will not result in a miscarriage of justice. Accordingly, Petitioner's fourth claim is barred from substantive review by his procedural error on appeal.

b. Alternative Analysis

Even assuming that Petitioner's claim about the jury instructions is not procedurally defaulted, a federal habeas court may not grant the writ on the basis that a jury instruction was incorrect under state law. *Estelle v. McGuire*, 502 U.S. 62, 71-72, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991). The question on habeas review of jury instructions is whether the instructions "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973). When "reviewing an ambiguous instruction ... [a court must] inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction [*38] in a way' that violates the Constitution." *McGuire*, 502 U.S. at 72 (quoting *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)).

The disputed instructions on Petitioner's theory and on inferring intent read as follows:

> The defendant says that he could not have intended to kill Tony (sic) King, because he did not have enough mental ability to form that intent. You must decide whether the defendant had enough mental ability to form that intent. You may think about such things as the defendant's history of mental problems and any circumstances having to do with the incident. The prosecution must prove, beyond a reasonable doubt, that the defendant could and did intend to kill Tony (sic) King or you must find the defendant not guilty of first degree murder.
>
> You must think about all the evidence in deciding what the defendant's state of mind was at the time of the alleged killing. The defendant's state of mind may be inferred from the kind of weapons -- weapon used, type of wounds inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged killing. You may infer that the defendant [*39] intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon.

Tr. V at 62.

These instructions were somewhat ambiguous. On the one hand, the jurors were told to consider whether Petitioner possessed the ability to form an intent to kill. On the other hand, they were instructed that they could infer an intent to kill from the use of a dangerous weapon in a way that was likely to cause death. n10 The trial court, however, went on to say:

> You have heard evidence concerning the defendant's mental condition at the time of the alleged crime. It is not enough that the defendant did an act that caused death. In addition, the defendant may have had a certain

> state of mind when he did the act. In deciding whether the defendant had the required state of mind, you may consider such things as the defendant's history of mental problems and all the circumstances surrounding the alleged crime.
>
> If you have a reasonable doubt about whether the defendant had the required state of mind at the time of the alleged crime, you must find the defendant [*40] not guilty only of first degree murder.
>
> *Id.* at 63. Later, in connection with Petitioner's defense of legal insanity, the trial court defined mental illness and explained that the jury had to consider whether the prosecutor had proved beyond a reasonable doubt that Petitioner was not mentally ill at the time of the crime. *Id.* at 66-68.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n10 It was undisputed that Petitioner shot and killed Toni King with a handgun.
- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The trial court also instructed the jurors to consider its instructions as a whole and to find Petitioner not guilty unless the prosecutor proved each element of the crime beyond a reasonable doubt. The court explained that, in order to establish the elements of first-degree murder, the prosecutor had to prove that Petitioner intended to kill Toni King. See Tr. V at 55-56, 61.

There is not a reasonable likelihood that the jury, viewing the instructions as a whole, misunderstood the burden of proof, the elements of the crime, or Petitioner's defense. Nor is it likely that the jury [*41] applied the disputed instruction in a way that violates the Constitution. Therefore, the state appellate court's decision was not contrary to, or an unreasonable

application of, Supreme Court precedent, and Petitioner is not entitled to habeas relief on the basis of his fourth claim.

4. Ineffective Assistance of Trial Counsel

Petitioner's fifth claim is that he was denied his constitutional right to the effective assistance of counsel. Petitioner alleges that his trial attorney should have objected when the prosecutor: (1) questioned a witness about Petitioner's silence during custodial interrogation; (2) mentioned the deceased victim's child; (3) vouched for a prosecution witness; and (4) referred to non-existent clinical studies and non-existent cocaine use. Although the Court has addressed these arguments in connection with Petitioner's other claims and his procedural defaults, the Court will review the arguments briefly as an independent claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. [*42] Petitioner must demonstrate that his attorney's "representation fell below an objective standard of reasonableness" and that the result of the proceeding would have been different "but for counsel's unprofessional errors." *Id.* at 688, 694.

The Michigan Court of Appeals used the same general standard when adjudicating Petitioner's claim and then concluded that Petitioner had failed to establish a claim of ineffective assistance of counsel. The court of appeals limited its review of Petitioner's claim "to mistakes apparent on the record" because Petitioner did not raise his ineffective-assistance-of-counsel claim in the trial court.

Petitioner attempted to raise his claim in the trial court by moving to remand his case for an evidentiary hearing. The court of appeals denied his motion because, in its opinion, the

motion was not filed within the time required by MCR 7.211(C)(1)(a); and ... failed to identify an issue sought to be reviewed on appeal and demonstrate by affidavit or an offer of proof the facts to be established at a hearing, MCR 7.211(C)(1)(a)(ii); and ... failed to demonstrate that the issue should be decided initially by the trial court. MCR 7.211(C)(1)(a)(i). [*43]

People v. Lancaster, No. 184033 (Mich. Ct. App. July 2, 1996). To the extent that Petitioner's failure to raise his claim at the trial court level constitutes an adequate and independent basis for foreclosing appellate review of Petitioner's claim, habeas review of Petitioner's claim is waived. Petitioner has not alleged cause for his procedural error and resulting prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750.

Even if Petitioner's claim of ineffective assistance of counsel is not procedurally barred, the prosecutor's conduct either was not improper or it did not deprive Petitioner of a fair trial. It follows that defense counsel's failure to object to the alleged misconduct did not constitute deficient performance and that the alleged deficiencies did not prejudice the defense. Therefore, the state court's decision was not contrary to, or an unreasonable application of, Strickland, and Petitioner has no right to habeas relief on the basis of his fifth claim.

5. Cumulative Effect of Errors

Petitioner's sixth and final claim is that the cumulative effect of the alleged errors resulted in actual prejudice [*44] at trial. Because the Court has concluded that Petitioner is entitled to a new trial on the basis of his first claim, the Court need not determine whether the cumulative effect of the alleged errors "so infected the trial as to violate [his] due process rights." *Rose v. Lundy*, 455 U.S. 509, 531, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982).

III. Conclusion

Petitioner is entitled to a writ of habeas corpus based on his Batson claim.

Petitioner's remaining claims, claims two through six, lack merit or are barred from substantive review by Petitioner's procedural defaults. Accordingly, the Court will GRANT the writ of habeas corpus unless the State retries Petitioner within 120 days.

SO ORDERED.

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: SEP 25 2001

JUDGMENT

This matter having come before the Court on a Petition for the Writ of Habeas Corpus, United States District Judge AVERN COHN presiding, and in accordance with the Opinion and Order entered on SEP 25 2001

IT IS ORDERED that the Petition for a Writ of Habeas Corpus is GRANTED unless the State retries Petitioner within 120 days.

Dated at Detroit, [*45] Michigan on SEP 25 2001.

APPROVED:

AVERN COHN
UNITED STATES DISTRICT JUDGE

1998 Mich. App. LEXIS 1781, *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v

BURT R. LANCASTER, Defendant-Appellant.

No. 184033

COURT OF APPEALS OF MICHIGAN

1998 Mich. App. LEXIS 1781

June 23, 1998, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 93-127632 FC.

JUDGES: Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

OPINION:

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227(b);

MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life in prison without parole for the murder conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence to prove that he was sane when he committed the offense. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. People v Hoffman, 225 Mich App 103, 111; [*2] 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

A defendant in a criminal proceeding is presumed sane. Once any evidence of insanity is introduced, however, the prosecution bears the burden of establishing defendant's sanity beyond a reasonable doubt. n1 *People v John*, 129 Mich App 664, 666; 341 NW2d 861 (1983). While a mentally ill criminal defendant is insane if he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, *People v Sorna*, 88 Mich App 351, 360; 276 NW2d 892 (1979), he is sane only if he possesses substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law, *People v Foster*, 138 Mich App 734, 737; 367 NW2d 349 (1984). The nature and quantum of rebuttal evidence of sanity sufficient to present an issue for the trier of fact is to some extent determined [*3] by the strength of the insanity evidence. *John, supra*. Merely some evidence of sanity may be sufficient to meet some evidence of insanity, but may be wholly insufficient to meet substantial evidence of insanity. Id. While testimony of lay witnesses may be

competent evidence of sanity, the fact that the witness did not observe any abnormal acts is of slight value unless the witness had prolonged an intimate contact with the defendant. *People v Murphy*, 416 Mich 453, 465-466; 331 NW2d 152 (1982).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n1 The insanity statute, MCL 768.21a; MSA 28.1044(1), was amended a month prior to the trial. Aside from slightly changing the definition of insanity, it specifies that the burden of proof is on the defendant to prove insanity by a preponderance of the evidence. The trial court elected to apply the old statute and instructed the jury accordingly. That ruling is not at issue here.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

We find that there was sufficient evidence to create an issue of [*4] fact as to whether defendant was mentally ill at the time of the offense and, even if so, whether he was nonetheless sane at the time he committed the offense.

Defendant next contends that the prosecutor improperly introduced evidence that he exercised his right to remain silent after being advised of his Miranda n2 rights. Even if defendant is correct, see *People v Westbrook*, 175 Mich App 435, 440; 438 NW2d 300 (1989), given that the issue has not been preserved for appeal due to defendant's failure to object below, that the prosecutor only elicited the allegedly improper testimony once and did not raise it in closing argument, that defendant elicited the same testimony from another witness, and that the evidence was irrelevant to the issue of sanity, we find that any error was harmless, *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n2 *Miranda v Arizona*, 384 U.S. 436; 86 S Ct 1602; 16 L. Ed. 2d 694 (1966).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*5]

Defendant next contends that he was denied effective assistance of counsel. Because defendant did not raise this issue below, review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *Id.* The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Having reviewed the record in light of this standard, we find that a claim of ineffective assistance of counsel has not been established.

Defendant next argues that the court erred in allowing the prosecutor to peremptorily dismiss a black juror. [*6] We disagree.

A prosecutor cannot use peremptory challenges to strike blacks from a jury, where the defendant is also black, simply because of race. *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), affirmed in part on another ground 437 Mich 161 (1991). The burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination. *Id.*

To establish a *prima facie* case, a defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from

the petit jury on account of their race. . . . In deciding whether the defendant has made the requisite showing, the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors and the questions and statements by the prosecutor during *voir dire* and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. [*7] [*Id.* at 705-706 (citations omitted).]

In this case, we agree that there was no prima facie showing of purposeful discrimination. See *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Accordingly, we find no error in the trial court's ruling.

Defendant next contends that he was denied a fair trial because of prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant did not raise the proper objections at trial, this Court will only reverse if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in manifest injustice. *Stanaway, supra* at 687.

Assuming that the prosecutor made an improper appeal to the jury's sympathy, *People v Modelski*, 164 Mich App 337, 347; [*8] 416 NW2d 708 (1987), or argued facts not in evidence when attacking the credibility of defendant's expert, *People v Thomas Miller*, 182 Mich App 482, 486; 453 NW2d 269 (1990), we find that the trial court's instructions to the jury were sufficient to dispel any prejudice resulting from the isolated remarks, *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Defendant's remaining contentions regarding prosecutorial misconduct are without merit.

Accordingly, we conclude that a failure to review the issue would not result in a miscarriage of justice.

Defendant next argues that the trial court erred when it gave CJI2d 6.21. Although the instructions given by the trial court correctly state the law, defendant contends that the law regarding circumstantial evidence of intent does not apply when a diminished capacity defense has been raised. Because defendant has failed to cite any authority in support of this contention, we deem the issue waived. *People v Pena*, 224 Mich App 650, 664; 569 NW2d 871 (1997).

Defendant next argues that the trial court erred in allowing the prosecutor's [*9] expert witness to testify regarding defendant's mental condition based on speculation and conjecture. Because defendant did not object at trial on the ground asserted on appeal, appellate review of this issue is precluded absent a showing of manifest injustice. *People v Welch*, 226 Mich App 461, 464; NW2d (1997); *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). The record reveals that the witness' opinion that defendant may not have been suffering from a mental illness was based on facts and observations, not speculation. Further, the witness unequivocally testified that even if defendant was mentally ill at the time of the offense, he was not legally insane. Therefore, we find no error.

Defendant finally contends that the cumulative effect of numerous errors deprived him of a fair trial. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test to determine whether reversal [*10] is required is not whether there were some irregularities, but whether defendant had a fair trial. *People v Kvam*, 160 Mich

App 189, 201; 408 NW2d 71 (1987). Our review of the record leads us to conclude that defendant received a fair trial.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski

BURT LANCASTER, Petitioner-Appellee,

v.

STANLEY ADAMS, WARDEN, Respondent-Appellant.

No. 01-2498

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2003 U.S. App. LEXIS 12560

June 4, 2003, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: *Lancaster v. Adams*, 324 F.3d 423, 2003 U.S. App. LEXIS 5774 (6th Cir.) (6th Cir. Mich., 2003)

JUDGES: BEFORE: COLE and CLAY, Circuit Judges; and BERTELSMAN, * District Judge.

* Hon. William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and [*2] decision of the case. Accordingly, the petition is denied.

Tr. II, pp. 3-4

Pontiac, Michigan
Tuesday, November 8,

1994 – 9:16 a.m.

THE COURT: Dave, can you get Mr. Sowell and Mr. Henry? They're out in the hall. How are you? Dave?

Before we begin, the Court yester---please be seated. Before we begin, yesterday the Court is not satisfied with the record made with regard to the Batson challenge of Mr. Bordon (sic). We were rushed to pick the jury. Mr. Walton, at the time, wanted to excuse Mr. Bordon (sic), who was juror number 9, a black gentlemen. He was not satisfied with the way in which the answers were given and he believed that he was not favorable to the prosecution. A hearing was held in chambers. The Court, at that time, was not satisfied with the explanation as given by Mr. Walton.

Subsequent to that, as the process continued, there was another juror, another African-American, who was selected, Mr. Keith Webb, which would have been in seat five. Mr. Walton renewed his objection again to Mr. Bordon (sic). Mr. Sowell vigorously objected to it, saying that if it was right then, it's right now, in terms of the ruling of the Court. The Court 13 Howard 6CC 160A – November 8, 1994 – 09:18:13 reflected---the Court, while not satisfied with the original explanation given Mr. ---given by Mr. Walton with regard to Mr. Bordon (sic.), how---the Court, however felt that that explanation was given more credibility by the subsequent examination of the other

jurors. The Court then reconsidered it's opinion, in light of the examination, and then felt, because of the conduct of the prosecution and the subsequent juror that it was legitimate, but I wanted to put that---Mr. Sowell, on behalf of the defendant, objected. That objection is still noted.

MR. SOWELL: Thank you very much, your Honor.

MR. HENRY: Thank you.

THE COURT: Thank you. All right, we're going to go. Anything else we have to discuss, gentlemen?

MR. WALTON: Not at this time, your Honor.

MR. HENRY: No---no, your Honor.

THE COURT: Okay. Thank you. Please Bring in the jury. Did my salsa get lost?

DEPUTY: Pardon me?

THE COURT: Did my salsa get lost?

(2)

Supreme Court, U.S.
FILED
OCT 7 2003
OFFICE OF THE CLERK

No. 03-356

In the Supreme Court of the United States

STANLEY ADAMS, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH M. MOGILL
Counsel of Record
MOGILL, POSNER & COHEN
27 E. FLINT STREET
2ND FLOOR
LAKE ORION, MI 48362
(248) 814-9470

Counsel for Respondent
Burt Lancaster

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

13 pp

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Where, as Here, a State Court Trial Judge Determined That a Prosecutor's Race-Neutral Explanation for the Exercise of a Peremptory Challenge Against an African-American Juror Was the Product of Discriminatory Intent, and Where the State Court Judge Later Reversed Himself on the Erroneous Belief That the Prosecutor's Absence of Challenge to a Subsequently Seated African-American Juror Excused the Discriminatory Challenge to the Earlier African-American Juror, the District and Circuit Courts Properly Considered the Totality of the State Court Judge's Comments and Findings in Concluding That the State Court Judge's Initial Finding Was Entitled to a Presumption of Correctness and That the Prosecutor's Exercise of a Peremptory Challenge Against the Earlier African-American Juror Was Based on Discriminatory Intent in Violation of the Rule of Batson v. Kentucky; Habeas Relief Was Properly Granted, and the Petition Should Be Denied.

TABLE OF CONTENTS

Counter-Statement of Question Presented for Review . . . i

Table of Contents ii

Table of Authorities iii

Counter-Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 9

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986) . . . . . passim
Coulter v. Gilmore, 155 F.3d 912 (7th Cir. 1998) 7
Greene v. Brigano, 123 F.3d 917 (6th Cir. 1997) 7
Hernandez v. New York, 500 U.S. 352 (1991) 9
Lancaster v Adams, 24 F.3d 423 (6th Cir. 2003) 8
McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000) 7
Purkett v. Elem, 514 U.S. 765 (1995) 4
Sinistaj v. Burt, 66 F.3d 804 (6th Cir. 1995) 7
Smith v. Texas, 311 U.S. 128 (1940) 3
Strauder v. Virginia, 100 U.S. 303 (1880) 3
Swain v. Alabama, 380 U.S. 202 (1965) 3
United States v. Battle, 836 F.2d 1084 (8th Cir. 1987) . 4
United States v. Harris,
192 F.3d 580 (6th Cir. 1999) 4, 8
United States v. Horsley,
864 F.2d 1543 (11th Cir. 1989) 8
United States v. McFerron,
163 F.3d 952 (6th Cir. 1998) 8
United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) . 4
Unites States Postal Service v. Aikens,
460 U.S. 711 (1983) 4

Statutes and Rules

28 U.S.C. § 2254 1
M.C.L. § 750.227b 1
M.C.L. § 750.316 1

COUNTER-STATEMENT OF THE CASE

Introduction. Respondent Burt Lancaster, a retired Detroit Police officer with a long personal and family history of serious mental health problems, was charged in the underlying case with and convicted of first-degree murder and possession of a firearm in the commission of a felony, M.C.L. §750.316; M.C.L. §750.227b, for having killed his girlfriend in the middle of the day in a parking lot in Southfield, Michigan, on April 22, 1993. Mr. Lancaster's defense to these charges was that he was legally insane at the time of the killing or that, in the alternative, his conduct was partially excused by diminished capacity. Following trial by a jury in Oakland County, Michigan, Circuit Court before Hon. Barry Howard, Oakland Circuit Judge, Mr. Lancaster was convicted as charged and sentenced to a mandatory term of life imprisonment without parole plus two years.

Following exhaustion of his state court remedies, Respondent timely petitioned for a writ of habeas corpus pursuant to 28 USC §2254. On September 25, 2001, Hon. Avern Cohn, Senior United States District Judge, granted the requested relief, finding Respondent's Batson claim to be meritorious but rejecting his other asserted grounds for relief (R26; Opinion and Order Conditionally Granting Writ of Habeas Corpus; Apx 127). On March 26, 2003, the United States Court of Appeals for the Sixth Circuit affirmed, and on June 4, 2003, the Sixth Circuit denied Petitioner's petition for rehearing *en banc*.

Statement of relevant facts. Mr. Lancaster is an African-American. During jury selection at his trial, the prosecutor used a peremptory challenge to excuse Mr. Bowden, one of two African-American males in the venire (Tr 11/07/93, p 115; Apx 331). The prosecutor asked no questions of Mr.

Bowden before moving to strike him (Tr 11/07/94, p 109; Apx 330). Defense counsel objected at the bench on Batson v. Kentucky (476 U.S. 79 (1986)) grounds, and the court conducted a brief hearing during which the prosecutor attempted to justify his action by asserting that Mr. Bowden's tone and temperament in responding to the court's questions left the officer-in-charge feeling uncomfortable (Court/Counsel, Tr 11/07/94, pp 117-120; Apx 333-336).

Judge Howard initially sustained the objection, stating that he did not have the same opinion of Mr. Bowden's responses and that the prosecutor's explanation was not valid (Court/Counsel, Tr 11/07/94, p 120; Apx 336). Judge Howard also expressed concern that permitting the strike to stand would result in only one African-American remaining in the pool of potential jurors (Court/Counsel, Tr 11/07/94, p 108; Apx 329). Later the same day, after another African-American, Mr. Webb, was called as a juror, the prosecutor renewed his objection to Mr. Bowden, and Judge Howard reversed himself without explanation (Court/Counsel, Tr 11/07/94, pp 128, 136-137; Apx 337, 339-341).

Explaining his turn-around the next morning, the judge alluded to the fact that Mr. Webb, who is also African-American, had been seated on the jury:

> ... as the process continued, there was another juror, another African-American, who was selected... Mr. Walton renewed his objection again to Mr. Bordon [sic] ... The Court reflected - the Court, while not satisfied with the original explanation given ... by Mr. Walton with regard to Mr. Bordon [sic] ... however felt that that explanation was given more credibility by the subsequent examination of the other jurors. The Court then reconsidered it's [sic] opinion, in light of

> the examination, and then felt, because of the conduct of the prosecution and the subsequent juror that it was legitimate ...

(Court/Counsel, Tr 11/08/94, pp 3-4; Apx 334-345).

REASONS FOR DENYING THE WRIT

This Court's efforts to eliminate racial discrimination in jury selection policies and practices began well over a century ago. In Strauder v. Virginia, 100 U.S. 303 (1880), this Court struck down a statute qualifying only white persons for jury duty as violative of the Fourteenth Amendment's central purpose, removing all discriminations implying "inferiority in civil society, lessening the security of their [African-Americans'] enjoyment of the rights which others enjoy".

In Smith v. Texas, 311 U.S. 128 (1940), this Court stressed that "racial discrimination in the exclusion from jury service of otherwise qualified groups not only violates the Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In Swain v. Alabama, 380 U.S. 202 (1965), this Court considered not a discriminatory statute but prosecutors' racially discriminatory exercise of peremptory challenges. The Court was unwilling in Swain to limit litigants' historical privilege of exercising peremptory challenges without judicial intervention, instead placing on the defense the heavy burden of establishing that the whole peremptory challenge system was being perverted before relief would be granted. By the mid-1980s, however, Swain's failure to prevent chronic and widespread racial discrimination in jury selection and the need for a new rule with teeth in it had become clear. Batson v.

Kentucky, 476 U.S. 79 (1986), established that new rule and has been a watershed in the Court's efforts to monitor and prevent (or at least reduce) the use of racial discrimination in litigants' exercise of peremptory challenges.

Batson's now-familiar three-step test[1] is designed to provide a workable means for avoiding the unconstitutional exclusion of even a single minority juror. *Cf.* Batson, *supra*, 476 U.S. at 95. Where such improper exclusion occurs, the harm accrues not only to the accused but also to "jurors not selected because of their race, and to the integrity of the judicial system as a whole". *Id.* 476 U.S. at 87-88; United States v. Harris, 192 F.3d 580, 587-588 (6th Cir. 1999); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987) (striking a single African-American on the basis of race

---

[1] The defense must first make out a *prima facie* case of purposeful discrimination, after which the burden shifts to the prosecution to offer a race-neutral explanation for the challenge. The final step in the analysis is for the court to decide whether the opponent of the strike has proved purposeful racial discrimination by a preponderance of the evidence. Batson, *supra*, 476 U.S. at 98; Purkett v. Elem, 514 U.S. 765 (1995); United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996). However, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate issue intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot". Hernandez v. New York, 500 U.S. 352, 359 (1991); United States v. Harris, 192 F.3d 580, 587 (6th Cir. 1999). Moreover, the *prima facie* prong of the test was "never intended to be rigid, mechanized or ritualistic ... [and] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination". Unites States Postal Service v. Aikens, 460 U.S. 711, 715 (1983).

violates equal protection even though other black jurors seated).

Batson's protection against the unconstitutional exclusion of even a single juror, and the state court trial judge's misapprehension of this fundamental rule, are at the heart of this case. As the Sixth Circuit and Judge Cohn properly understood, a prosecutor's racially motivated challenge of one juror is not excused by his absence of such improper conduct as to a later minority juror. Judge Cohn spoke directly to this point in his opinion:

> The fact that another African-American took a seat in the jury box, a fact which apparently greatly influenced the trial court, was irrelevant ... "[a] single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."

(R26; Opinion and Order Conditionally Granting Writ of Habeas Corpus at p 9 (cite omitted); Apx 135).

In coming to his conclusion, Judge Cohn was called upon to consider the totality of the state court trial judge's comments and actions on the issue, and he did so thoughtfully and carefully. He examined the judge's initial decision to sustain the Batson objection to Mr. Bowden, he considered the judge's reversal of field when Mr. Webb, another African-American juror, was seated, and he took into account the judge's explanation the next morning as to why he had changed his earlier decision, an explanation which included reference to the fact that Mr. Webb was African-American.

Petitioner would have this Court limit Judge Cohn's consideration of the record to the state court trial judge's last

statement on the issue rather than the totality of the circumstances. Such a rule would overlook the obvious fact that, in order fairly to assess what the trial judge meant by the words he used in his last comment, one *must* consider the surrounding circumstances, particularly where, as here, the comment itself makes reference to those circumstances and can only be properly understood by consideration of them. The district and circuit courts properly rejected such a position.

Taking out of context the trial judge's reference to a reassessment of the prosecutor's explanation, Petitioner argues to this Court that the comment must be held to mean that the trial judge had come to decide that the prosecutor's decision to strike Mr. Bowden was not on the basis of race. Given the timing of the trial judge's abrupt reversal of field -- *e.g.*, when another African-American juror was seated -- and his mention of that circumstance in his next day's comments, it is entirely reasonable to question whether the judge's comments meant something very different from what Petitioner is arguing. Considering the totality of the circumstances, the trial judge most likely meant that, since the prosecutor was not excluding all minorities, as he was willing to keep Mr. Webb on the jury, he (the prosecutor) was not going overboard, and the judge was, therefore, willing to permit the prosecutor to trade Mr. Webb's presence for that of Mr. Bowden. It also appears that the judge's conclusion was based on a misunderstanding of the extent to which Batson and its progeny prohibit the use of race as a consideration in excluding even a single juror.

In deciding this case, Judge Cohn was necessarily required to decide what the trial judge meant in all of his comments and actions and whether the trial judge's analysis had been based on a correct or incorrect interpretation of Batson. That

task included fact determinations a federal court accepts unless clearly erroneous. Greene v. Brigano, 123 F.3d 917 (6th Cir. 1997); Sinistaj v. Burt, 66 F.3d 804, 807 (6th Cir. 1995). Judge Cohn's conclusion that the trial judge had "apparently [been] greatly influenced" by the presence of another African-American in the jury box is not only amply supported by the record, it is, ultimately, the only logical explanation of why the trial judge did and said what he did when he did. As Judge Cohn also noted, however, and as the law is clear, the fact that "the prosecution subsequently permitted another African-American to be seated was also irrelevant" (R26; Opinion and Order at p 9; Apx 135).

Judge Cohn's conclusion -- and the trial judge's initial conclusion -- is further supported by the extreme thinness of the prosecutor's explanation of reasons for striking Mr. Bowden, an explanation that was subjective and unrelated to the case. The prosecution's attempt to attribute the decision to strike Mr. Bowden to the officer-in-charge, who was also African-American, transparently sought to pass the buck to a, hopefully, more palatable source for a discriminatory challenge. The ploy was too clever, however, and was further reason to question the sincerity of the prosecutor's words. [The tactic, if accepted, would also virtually eliminate the protections of Batson in any case in which the officer-in-charge or prosecutor is a member of the same racial or ethnic group as the accused.] While prosecutors are given very substantial latitude in offering race-neutral reasons to support peremptory challenges of minority jurors, courts have not hesitated to reject them as pretexts when they are "[i]mplausible or fantastic". *Cf., e.g.,* McClain v. Prunty, 217 F.3d 1209, 1218 (9th Cir. 2000) (exercise of peremptory against minority juror because she was "'overly educated'" and because of her body language inadequate as race-neutral explanation of strike); Coulter v. Gilmore, 155 F.3d 912, 920

(7th Cir. 1998) (explanation that juror seemed "timid" "verg[ed] on the absurd"); United States v. Horsley, 864 F.2d 1543, 1544 (11th Cir. 1989) ("I just got a feeling about him" legally insufficient). Both Judge Cohn and the Sixth Circuit properly found that, given the totality of this record, the prosecutor's explanation was outside the range of acceptable claims.

The Sixth Circuit's concluding comments well sum up why habeas relief was properly granted in this case:

> ... without more, the prosecutor's decision to select a subsequent African-American juror from the venire does nothing to cure the wrong committed under *Batson* in excluding Bowden because of his race. Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*.

Lancaster v Adams, 24 F.3d 423, 434 (6th Cir. 2003).

Finally, it is important to note that a Batson error is structural error not subject to harmless error analysis. Harris, *supra*, 192 F.3d at 588; United States v. McFerron, 163 F.3d 952, 956 (6th Cir. 1998).

For all the reasons stated above, Judge Cohn's decision was correctly arrived at procedurally, it was the correct decision substantively, and the Sixth Circuit properly affirmed that decision. The issues raised by Petitioner do not warrant

the exercise of this Court's discretionary jurisdiction, and the Petition should be denied.[2]

CONCLUSION

For all the reasons stated above, the Petition should be denied.

Respectfully Submitted,

Kenneth M. Mogill
MOGILL, POSNER & COHEN
27 E Flint Street, 2d Floor
Lake Orion, Michigan 48362
(248) 814-9470

Attorney for Respondent

October 3, 2003

---

[2] For these reasons, Petitioner's second asserted reason for granting the writ -- focusing on the state court's ultimate legal conclusion rather than on whether the Michigan Court of Appeals erred in its application of Batson, *supra*, and Hernandez, *supra* -- also fails and warrants no further discussion.